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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

BY
HORACE GRAY, JR.

VOLUME X

BOSTON:
LITTLE, BROWN AND COMPANY.
1865.

Entered according to Act of Congress, in the year 1864, by
LITTLE, BROWN AND COMPANY,
in the Clerk's Office of the District Court of the District of Massachusetts.

JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
HON. GEORGE T. BIGELOW,
HON. BENJAMIN F. THOMAS.
HON. PLINY MERRICK.

ATTORNEY GENERAL.

HON. JOHN H. CLIFFORD.
(Term of office expired January 20th 1858.)
HON. STEPHEN H. PHILLIPS.
(Qualified January 20th 1858.)

TABLE

OF THE CASES REPORTED.

Adams v. Barry	361	Bass v. Haverhill Mutual Fire	
— v. Boston Iron Co.	495	Ins. Co.	400
— v. Boston Wharf	521	Benedict, (Eastern Railroad v.)	212
— v. Wadleigh	360	Bigelow v. Poole	104
Albee v. Wyman	222	Black River Savings Bank v.	
Allen (People's Mut. Ins. Co.		Edwards	387
v.)	297	Boston, City of, v. Worthington	496
— (Rhoades v.)	35	Boston & Maine Railroad v.	
— (Stickney v.)	352	Bartlett	384
Alliance Ins. Co. (Kettell v.)	144	— (Langley v.)	103
American Mutual Life Ins. Co.		Boston Iron Co. (Adams v.)	495
(Hammond v.)	306	Boston Papier Maché Manu-	
Amory (Cabot v.)	428	facturing Co. (Coburn v.)	243
Anderson v. Brown	92	Boston Wharf (Adams v.) . .	521
Armstrong v. Crocker	269	Bradford v. Stevens	379
Arthur v. Flanders	107	Brewster v. Bailey	37
Atlantic Bank v. Merchants'		Bridgeport Ins. Co. (Parker v.)	302
Bank	532	Brigham v. Coburn	329
Augusta Ins. & Banking Co.		Brown (Anderson v.)	92
(Perkins v.)	312	— (Doherty v.)	250
Austin v. Harris	296	— (Peabody v.)	45
		— v. Stone	61
Bailey (Brewster v.)	37	Buxton (Commonwealth v.)	9
— (Cram v.)	87		
Balch v. Hallet	402	Cabot v. Amory	428
Bangs v. Lincoln	600	Campbell v. Wallace	162
Bank of Bellows Falls, (Hen-		Carnes v. Nichols	369
shaw v.)	568	Cayzer v. Taylor	274
Banks (Shelton v.)	401	Charlestown Mutual Fire Ins.	
Barker v. Parker	339	Co. (Collins v.)	155
— v. Valentine	341	Coburn v. Boston Papier Maché	
Barry (Adams v.)	361	Manufacturing Co.	243
— v. Page	398	— (Brigham v.)	329
Bartlett (Boston & Maine		Cogswell (Warren v.)	76
Railroad v.)	384	Collins v. Charlestown Mutual	
— (Dunlap v.)	282	Fire Ins. Co.	155
— (Fletcher v.)	491	Commonwealth v. Buxton . .	9
— (Wass v.)	490	— v. Evans	463

Commonwealth v. Farrar	6	Gassett v. Cottle	375
— v. Grimes	470	Gorman v. Wheeler	362
— v. Hart	465	Greenwood v. Lake Shore Rail- road	373
— v. Jenkins	485	Grimes (Commonwealth v.)	470
— v. Lang	11	Grosvenor (Lathrop v.)	52
— v. Murphy	1	Gustin v. School District in Danvers	85
— v. O'Hara	469		
— v. Price	472	Hale v. Huse	99
— v. Rock	4	Hallet (Balch v.)	402
— v. Skelley	464	Hammond v. American Mutual Life Ins. Co.	306
— v. Thomas	483	Hanscom (Hewes v.)	336
— v. Tuckerman	173	Hardy v. Potter	89
— v. Woods	477	Harris (Austin v.)	296
Cook v. Farrington	70	— v. Inhabitants of Mar- blehead	40
Cottle (Gassett v.)	375	Hart (Commonwealth v.)	465
County Commissioners (Pea- body v.)	97	Harvard College (Peabody v.)	283
Cram v. Bailey	87	Haverhill Mutual Fire Ins. Co. (Bass v.)	400
Crocker (Armstrong v.)	269	Hayes (Montague v.)	609
Currier (Tyler v.)	54	Heath (Prince v.)	17
Cushing (Putnam v.)	384	— (Wells v.)	17
		Heebner v. Eagle Ins. Co.	181
Danvers, School District in (Gustin v.)	85	Henshaw v. Bank of Bellows Falls	568
Dewing v. Durant	29	Hewes v. Hanscom	336
De Wolf (Noxon v.)	343	Hodges v. Pingree	14
Doherty v. Brown	250	Holton (Newell v.)	349
Dunlap v. Bartlett	282	Hooper (Parsons v.)	254
Durant (Dewing v.)	29	— (Somerset Potters' Works v.)	254
		— (Tremlett v.)	254
Eagle Ins. Co. (Heebner v.)	181	Houghton v. Wilson	365
— (Lewis v.)	508	Hoyt v. Robinson	371
Eastern Railroad v. Benedict	212	Hudson River Ins. Co. (Pin- gree v.)	170
Edwards (Black River Savings Bank v.)	387	Huse (Hale v.)	99
Emerson v. White	351		
Evans (Commonwealth v.)	463	Irish (Potter v.)	416
Farrar (Commonwealth v.)	6	Jacot v. Wyatt	236
Farrington (Cook v.)	70	Jenkins (Commonwealth v.)	485
Fenno (Power v.)	249	Jewett v. Jewett	31
Fernald (Osgood v.)	57		
Fisher v. Minot	260	Kettell v. Alliance Ins. Co.	144
Fitchburg Railroad (Twycross v.)	293	Kinsley v. Rice	325
Flanders (Arthur v.)	107		
Fletcher v. Bartlett	491	Lake Shore Railroad (Green- wood v.)	376
Fogg v. Pew	409		
Fredericks (Willey v.)	357		
Fuller v. Ruby	285		
— v. Salem & Danvers Loan & Fund Association	94		

TABLE OF CASES REPORTED.

vii

Lang (Commonwealth v.)	11	Otis v. Prince	581
Langley v. Boston & Maine Railroad	103	Page (Barry v.)	398
Lathrop v. Grosvenor	52	—— v. Melvin	208
Lawson (Shattuck v.)	405	Paige (Newhall v.)	366
Leeds v. Wakefield	514	Parker (Barker v.)	339
Lewis v. Eagle Ins. Co.	508	—— v. Bridgeport Ins. Co.	302
—— v. Springfield Fire & Marine Ins. Co.	159	—— (New England Steam & Gas Pipe Co. v.)	333
Lincoln (Bangs v.)	600	Parks v. City of Newburyport	28
Lord v. Neptune Ins. Co.	109	Parsons v. Hooper	254
Lovering (Wheatland v.)	16	Peabody v. Brown	45
McClintock (Welch v.)	215	—— v. County Commissioners	97
McGregor v. Wait	72	—— v. Harvard College	283
Manufacturers' Ins. Co. (Minturn v.)	501	People's Mut. Ins. Co. v. Allen	297
Marblehead, Inhabitants of, (Harris v.)	40	Perkins v. Augusta Ins. & Banking Co.	312
Martin (Wetherbee v.)	245	Pew (Fogg v.)	409
Melvin (Page v.)	208	Philbrick (Smith v.)	252
Merchants' Bank (Atlantic Bank v.)	532	Phillips v. Tudor	78
—— v. Stevenson	232	Pingree (Hodges v.)	14
Merrill (Welch v.)	91	—— v. Hudson River Ins. Co.	170
Minot (Fisher v.)	260	Poole (Bigelow v.)	104
—— (Thomas v.)	263	Porter (Smith v.)	66
Minturn v. Manufacturers' Ins. Co.	501	Potter (Hardy v.)	89
Mizner v. Munroe	290	—— v. Irish	416
Montague v. Hayes	609	Power v. Fenno	249
Munroe (Mizner v.)	290	Prescott v. Pulsifer	49
Murphy (Commonwealth v.)	1	Price (Commonwealth v.)	472
Neale (Reed v.)	242	Prince v. Heath	17
—— (Winship v.)	382	—— (Otis v.)	581
Neptune Ins. Co. (Lord v.)	109	Prichard (Wills v.)	327
Newburyport, City of, (Parks v.)	28	Putnam v. Cushing	334
Newcomb v. Noble	47	—— v. Tuttle	48
Newell v. Holton	349	Pulsifer (Prescott v.)	49
New England Steam & Gas Pipe Co. v. Parker	333	Reed v. Neale	242
Newhall v. Paige	366	Rhoades v. Allen	35
Nichols (Carnes v.)	369	Rice (Kinsley v.)	325
—— (Williams v.)	88	Richardson (Wyeth v.)	240
Noble (Newcomb v.)	47	Robinson (Hoyt v.)	371
Noxon v. De Wolf	343	Rock (Commonwealth v.)	4
O'Connor v. Varney	231	Rogers v. Sawin	376
O'Hara (Commonwealth v.)	469	Ruby (Fuller v.)	285
Opinion of Justices	613	Salem & Danvers Loan & Fund Association (Fuller v.)	94
Osgood v. Fernald	57	Sawin (Rogers v.)	376
		Shattuck v. Lawson	405
		Shaw (Starbuck v.)	492
		Shelton v. Banks	401
		Skelley (Commonwealth v.)	464

Smith v. Philbrick	252	Varney (O'Connor v.)	231
—— v. Porter	66	Wadleigh (Adams v.)	360
Somerset Pottery Works v.		Wait (McGregor v.)	72
Hooper	254	Wakefield (Leeds v.)	514
Springfield Fire & Marine		Wallace (Campbell v.)	162
Ins. Co. (Lewis v.)	159	Warren v. Cogswell	76
Starbuck v. Shaw	492	Washington Ins. Co. (Thwing	
Stevens (Bradford v.) . . .	379	v.)	443
Stevenson (Merchants' Bank v.)	232	Wass v. Bartlett	490
Stickney v. Allen	352	Welch v. McClintock	215
Stone (Brown v.)	61	—— v. Merrill	91
Taylor (Cayzer v.)	274	Wells v. Heath	17
Thayer v. Tyler	164	Wetherbee v. Martin	245
Thomas (Commonwealth v.)	483	Wheatland v. Lovering	16
—— v. Minot	263	Wheeler (Gorman v.)	362
Thwing v. Washington Ins. Co.	443	White (Emerson v.)	351
Tremlett v. Hooper	254	Whittenton Mills v. Upton . .	582
Tuckerman (Commonwealth v.)	173	Willey v. Fredericks	857
Tudor (Phillips v.)	78	Williams v. Nichols	83
Tuttle (Putnam v.)	48	Wills v. Prichard	827
Twycross v. Fitchburg Railroad	293	Wilson (Houghton v.)	365
Tyler v. Currier	54	Winship v. Neale	382
—— (Thayer v.)	164	Woods (Commonwealth v.) . .	477
Upton (Whittenton Mills v.)	582	Worthington (City of Boston v.)	496
Valentine (Barker v.)	341	Wyatt (Jacot v.)	236
		Wyeth v. Richardson	240
		Wyman (Albee v.)	222

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT.
FOR THE
COUNTY OF ESSEX, NOVEMBER TERM 1857,
AT SALEM.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF, } JUSTICES.
HON. BENJAMIN F. THOMAS,
HON. PLINY MERRICK,

COMMONWEALTH vs. HENRY MURPHY.

Upon the trial of an indictment on *St. 1855, c. 215, §§ 15, 17*, for selling intoxicating liquors "without having any license, appointment or authority therefor," the Commonwealth need not prove that the defendant did not when that statute took effect own the liquors sold by him.

The fifteenth and seventeenth sections of the *St. 1855, c. 215*, are constitutional and valid. The refusal of the judge presiding at a criminal trial to allow the defendant's counsel to read to the jury an adjudication by the highest court of another state that a statute like that upon which this prosecution is founded is contrary to the constitution of that state is no ground of exception.

INDICTMENT on *St. 1855, c. 215, §§ 15, 17*, for selling intoxicating liquors "without having any license, appointment or authority therefor." At the trial in the court of common pleas

before *Perkins, J.* there was evidence that the defendant sold intoxicating liquors as alleged, but no evidence whether he did or did not own those liquors at the time of the passage of the statute upon which he was indicted. The defendant requested the judge to rule :

“1st. That the law of 1855, prohibiting the sale of spirituous and intoxicating liquors, so far as it applies to liquor which at the time of its enactment was in the hands of the defendant as his property, is unconstitutional and void.

“2d. That the government in order to obtain a conviction under this indictment must allege and show that the liquor sold by the defendant was not lawfully his property at the time of the enactment of said statute.

“3d. That the legislature has no authority to deprive an individual of property, and the right of sale and other rights which attach to it, except in the manner provided by the Constitution, viz. by making a proper compensation.”

But the judge ruled that the law was constitutional so far as the present indictment was concerned, notwithstanding these objections.

The defendant offered to show that the highest court of judicature of the State of New York had decided a law precisely like this statute of 1855 to be unconstitutional, and in contravention of the principles of the common law of the land, by introducing and reading to the jury the third volume of Kernan's New York Reports, which, as the attorney for the Commonwealth admitted, contained the decisions of said court. [*Wynehamer v. People*, 3 Kernan, 378.] But the judge refused to permit it to be read to the jury.

The defendant being convicted, alleged exceptions.

W. D. Northend & G. F. Choate, (*E. W. Kimball* with them,) for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

SHAW, C. J. This is an indictment on the 15th and 17th sections of the liquor law of 1855.

1. The defendant contended that so far as the offence charged consisted of selling liquor which the defendant owned before

the statute of 1855, it was unconstitutional and void; and that the burden of proof was on the prosecution to prove that the liquor sold was not so owned by the defendant at the time the law took effect. The court declined. We think the refusal was right. The indictment charged that the defendant sold liquor "without any license, appointment or authority therefor." Upon this it has been repeatedly held, that if the defendant had any authority, it was matter of defence, and the burden of proof was on him. *Commonwealth v. Ryan*, 9 Gray, 139, and cases there cited.

Besides, the direction asked for was founded on a hypothetical case, without any proof. If it would be a good defence, the defendant must prove or offer to show that he did so own it; whether this would be a good defence we give no opinion, because no such offer was made.

2. The court therefore was right in ruling that the law in the 15th and 17th sections was constitutional. In fact these are little more than the reënactment of provisions long in force.

3. Another exception is that the judge prohibited the counsel for the defendant from reading an adjudication of the court of appeals of the State of New York, declaring a statute of somewhat similar character unconstitutional and void. This was purely a local decision, on a different constitution, a different statute, and all merely local, of no force here. Without laying down any general rule respecting the reading of books on a trial, the court are of opinion that this was rightly rejected.

Exceptions overruled.

COMMONWEALTH vs. JOHN ROCK.

Since the *St.* of 1855, c. 152, as well as before, the jury in a criminal case are to be governed by the instructions of the court in matter of law.

One indicted on *St.* 1855, c. 215, § 17, for being a common seller of intoxicating liquors, cannot except to a refusal of the presiding judge to rule that, if that statute provides for a trial contrary to the course and usage of the common law, it is unconstitutional and no verdict should be found under it.

INDICTMENT ON *St.* 1855, c. 215, § 17, for being a common seller of intoxicating liquors. Trial in the court of common pleas before *Bishop, J.*, who allowed this bill of exceptions:

"The defendant's counsel requested the court to instruct the jury that they (the jury) are not in their decision upon the law necessarily to be governed by the opinion of the judge presiding at the trial; and further that this law under which this indictment is found, if it provides for a trial contrary to the course and usage of the common law, is unconstitutional and no verdict is to be found under it.

"But the court declined so to instruct the jury; and instructed them on the first point, that in their deliberations they were to be governed by the law as stated to them by the court, and that it was their province to apply the law so stated to the facts proved on the trial, and to decide upon the whole case whether the offence charged was or was not proved beyond a reasonable doubt.

"Upon the second point the court declined to give any instructions to the jury upon the ground that the instructions prayed for were upon a hypothetical case, and not upon any point legitimately raised during the trial; and ruled that all the proceedings at the trial of this case were in accordance with the course and usage of the common law.

"To which several rulings the defendant, being found guilty excepted."

G. F. Choate, (*E. W. Kimball* with him,) for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

SHAW, C. J. Various exceptions are taken to the decisions of the judge at the trial.

1. The first is to his instruction that the jury are to be governed by the direction of the court in matters of law. This was right. A majority of the court, upon great deliberation, have decided, either that the jury law of 1855 did not change the law as it previously stood, but was merely declaratory; or, if it could be so construed as to change the law, and make the jury judges of the law, it was unconstitutional and void; and in either case, the direction of the judge was right. *Commonwealth v. Anthes*, 5 Gray, 185. *Commonwealth v. Martin*, 5 Gray, 303, note.

2. The defendant's counsel further requested the judge to instruct the jury, that the law under which this indictment was found, if it provides for a trial contrary to the course and usage of the common law, is unconstitutional and no verdict is to be found under it.

Upon this point the court declined to give any instruction to the jury, on the ground that the instructions prayed for were upon a hypothetical case and not upon any point legitimately raised in the case during the trial, and that the proceedings were according to the course of the common law.

We think this right. The case supposed was purely an abstract question, not raised by any facts, or any evidence tending to prove facts, admitted or rejected, and therefore the judge was not legally called upon to give any direction or opinion upon it.

The prosecution against the defendant was for being a common seller. This law and this mode of trial have long been in use, and are according to the course of the common law.

It is not necessary to consider whether other parts of the statute known as the liquor law are or are not constitutional; if part of a statute is good, it will be carried into effect, though other parts, not connected with it, are unconstitutional. *Fisher v. McGirr*, 1 Gray, 21. *Warren v. Mayor & Aldermen of Charlestown*, 2 Gray, 99. *Exceptions overruled.*

COMMONWEALTH vs. JOHN FARRAR.

Upon the trial of an indictment for unlawful sales of intoxicating liquors, two witnesses testified that they drank such liquors together at the defendant's shop and other places; one of them testified that his object was to inform against the sellers; but both testified that the other did not know of this object, and he testified that his only object was to gratify his appetite. He was asked on cross-examination whether on leaving one of these places the other witness did not whistle for him, and answered in the negative. *Held*, that this answer was immaterial, and could not be contradicted.

INDICTMENT ON *St.* 1855, c. 215, §§ 15, 17, for unlawfully selling intoxicating liquors. Trial and conviction in the court of common pleas before *Bishop*, J., who allowed this bill of exceptions:

"The only witnesses called by the government who testified to any sales of intoxicating liquors were David M. Currier and Thomas J. Burns of Methuen. They testified that upon the evenings of the 17th and 20th of January 1857 they purchased and drank at the defendant's house and eight or ten other places intoxicating liquors. Currier testified that he came to Lawrence with Burns to purchase at said places, and for the purpose of informing against the persons keeping the said places; but that Burns did not know of his object, and that neither he nor Burns had ever before the 17th been at either of said places. Burns testified that he came to Lawrence with Currier, but had no suspicion of his object in visiting the places where he either went with or met him; that his own only object in going to the various places was to get liquor to gratify his appetite for the same. Both Currier and Burns testified that they met upon the 17th and 20th aforesaid at all of those places where they got drink by mere accident, and without arrangement or any concert of action.

"Upon the cross-examination Burns was asked if, upon leaving one of the places where they got drink upon these occasions, Currier did not whistle for him. He said, 'No; he did not.' He was then asked if he had not testified upon a former occasion that Currier did so whistle for him. He answered that he

had not so testified. The counsel for the defendant then offered to prove that Burns had so testified. But the court, deeming it collateral and immaterial to the issue, refused to allow witnesses to be called for the purpose of contradicting Burns upon this subject."

D. Saunders, Jr., for the defendant, cited *Commonwealth v. Sacket*, 22 Pick. 394; *Folsom v. Brawn*, 5 Foster, 114; *Drew v. Wood*, 6 Foster. 363; *Newton v. Harris*, 2 Selden, 345; *Cameron v. Montgomery*, 13 S. & R. 132.

J. H. Clifford, (Attorney General,) for the Commonwealth.

MERRICK, J. The evidence offered to disprove the truth of the answer given by Burns, a witness produced in support of the prosecution, to a question put to him on his cross-examination, was excluded solely upon the ground that the fact of which he testified was collateral and irrelevant to the issue to be tried. 'The rule of law upon which this exclusion was directed is too familiar and well settled to be denied; and the defendant does not attempt or propose to contest it. 1 Greenl. Ev. § 449. His objection is not to the rule, but to the application of it in a case and under circumstances where he contends it ought not to have been applied. His position is, that the fact that Burns was called by the whistle of Currier to some one or more of the several drinking shops which they visited together would, if proved, have had a tendency to show that there was a previously arranged scheme or confederacy between them to induce sundry persons to make sales of spirituous liquors in violation of law, and thus to procure the means wherewith to convict them of a criminal offence; that such a confederacy must necessarily have created a bias and prejudice in their minds against the parties who were the objects of their conspiracy; and that such feelings, or state of feeling, may always be shown, to impeach a witness and disparage his credibility.

But without stopping to determine the question of law involved in this general proposition, or even at all to consider it, since it seems wholly unnecessary to do so, we think it very clear that the position taken by the defendant cannot be maintained. Currier undoubtedly went to Lawrence to purchase

liquor at various places for the purpose of informing against the keepers of them. That he openly and distinctly avows. But he testified that he did not make known this purpose to Burns ; and the latter declared that he was entirely ignorant of it. His object, according to his own testimony, was to get the liquor merely to gratify his appetite and desire to drink it. The fact that he was invited by a companion, either in express terms or by token which was equally intelligible, to accompany him to places where intoxicating liquor could be procured, is certainly not less consistent with the supposition that in giving his attention to it he was seeking renewed opportunities of indulgence, than with the hypothesis that he was an accomplice in a conspiracy to procure the commission of a crime for the sake of prosecuting the offender. The witness may have had the one or the other of these objects in view ; he may have been influenced in his conduct by motives which either of them would have excited. But which of them exerted this influence, the fact that he first received an invitation, or listened to some sound which he understood to be its equivalent, before he went to the place of sale, has no tendency to elucidate or disclose. It is not inconsistent with either hypothesis. It was therefore immaterial and worthless as a means of proof, and was properly rejected as collateral and irrelevant to the issue, because it could afford no aid to the jury in reference to the question upon which they were to pass. Whenever the evidence of circumstances leaves it indifferent which of several hypotheses is true, it never can amount to proof, however great the probability in relation to one of them may be ; and it can therefore scarcely fail to be the occasion of injustice if it is not in practice entirely disregarded.

1 Stark. Ev. (1st Amer. ed.) 506. *Exceptions overruled.*

COMMONWEALTH vs. CHARLES W. BUXTON.

On the trial of an indictment on *St.* 1855, c. 405, for keeping a building used in the manner declared by that statute to be a common nuisance, no proof is required of the allegation in the indictment of the building's "being a common nuisance to the great injury and common nuisance of all the peaceable citizens."

INDICTMENT ON *St.* 1855, c. 405, for keeping and maintaining at Salem, during a certain time, "a certain building, to wit, a shop then and there resorted to for illegal gaming, and then and there used by the said Buxton for the illegal sale and keeping of intoxicating liquors; said building so used as aforesaid being then and there a common nuisance, to the great injury and common nuisance of all the peaceable citizens of said commonwealth there residing and inhabiting, passing and repassing; against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided."

At the trial in the court of common pleas, the defendant contended that the jury would not be warranted in convicting him upon mere proof of his keeping and maintaining this shop and using it for the illegal sale and keeping of intoxicating liquors, without its being proved, as alleged, to have been to the great injury and common nuisance, &c. But *Perkins, J.* refused so to rule, and the defendant, being convicted, alleged exceptions.

W. D. Northend, (*E. W. Kimball* with him,) for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

DEWEY, J. The concluding allegation of this indictment, "to the great injury and common nuisance of all the citizens," &c., is in accordance with the well established forms of indictments for a nuisance at common law. Upon the trial of such indictment, it must be established that the acts complained of show a case of public nuisance. Cases may arise as to alleged public nuisances where it may be proper to submit to the jury, under proper instructions from the court, the question whether the acts proved show anything more than a private injury. But in most cases, the evidence necessary to prove the alleged

acts of the defendant would fully discharge all the duty devolving upon the Commonwealth, in maintaining that the same were "to the injury and common nuisance of all the citizens," &c. This would be so especially in indictments at common law for keeping a common gaming house or a house of ill fame, inasmuch as the very acts alleged, if proved, would *per se* prove a case of common nuisance.

It is unnecessary however, in deciding the present case, to go more fully into the consideration of the question how far, in indictments at common law, the government must prove affirmatively that the acts complained of affect large numbers of people and are a common nuisance, in distinction from an injury to a few individuals. This indictment is upon the express provisions of a statute of this commonwealth. St. 1855, c. 405. The statute itself declares, that all buildings used for the purposes for which this building is alleged to have been kept and maintained shall be common nuisances, and be regarded and treated as such. It further enacts that every person, keeping or maintaining such common nuisance, shall be punished; thus fixing the character of those acts set forth in this indictment, and declaring that the party doing the same is guilty of a common nuisance. The result is therefore, that if the facts alleged of the keeping and maintaining of the building for the purposes named in the statute are proved, the fact of the defendant's keeping and maintaining a common nuisance is also proved, which is all that is requisite to show to sustain the concluding averment, "to the great injury and common nuisance of all the citizens," &c.

There is therefore no ground for any exceptions upon this point to the ruling of the court of common pleas.

Exceptions overruled.

COMMONWEALTH vs. FRANCIS LANG, JR.

Upon an indictment for a felonious assault by shooting with a pistol with intent to murder, the jury returned a verdict of "guilty of the assault and battery as charged, but without the felonious intent." *Held*, that this verdict might be amended by the court during the same sitting by striking out the words "and battery;" and, thus amended, was sufficient.

Under the Rev. Sts. c. 137, § 11, a person indicted for an assault with intent to murder may be convicted and sentenced for an assault without felonious intent.

The eleventh section of the Rev. Sts. c. 137, providing that any person indicted for a felony, and acquitted of part of the offence charged, and convicted of the residue, may be adjudged guilty of the offence, if any, substantially charged in the residue of the indictment, is not unconstitutional as conflicting with the twelfth article of the Declaration of Rights.

INDICTMENT on the Rev. Sts. c. 125, § 11, averring that the defendant at a certain time and place made an assault upon Simeon McQuestion, and "a certain pistol, then and there loaded with gunpowder and a leaden ball, which pistol he the said Lang then and there in his right hand had and held, at and against the said Simeon McQuestion then and there feloniously, unlawfully and maliciously did discharge and shoot, with intent in so doing him the said McQuestion then and there and thereby feloniously, wilfully and of his malice aforethought to kill and murder; and by so doing and by force of the statute in such case made and provided the said Lang is deemed a felonious assaulter." "And so," (the indictment concluded,) the defendant, at the time and place aforesaid, "with force and arms, feloniously assaulted the said Simeon McQuestion in manner and form aforesaid; against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided."

Trial in the court of common pleas, before *Perkins, J.*, who signed this bill of exceptions: "The jury returned a verdict, which was received by the court and recorded by the clerk on the back of the indictment in the following words: 'Guilty of the assault and battery as charged, but without the felonious intent.' But the indictment charging no battery, and the jury having found nothing in reference to a battery, that part, to wit,

the words 'and battery,' was during the sitting of the court stricken out of the entry on the back of the indictment, as inadvertently entered by the clerk, so that the entry as corrected is, 'Guilty of the assault as charged, but without the felonious intent.' The jury were then discharged from further consideration of the case. Immediately after the following entry was made upon the court docket: 'Guilty, but without any felonious intent.'

"Afterwards the defendants moved that judgment be arrested, because

"First, he has not been convicted of any offence by the verdict of a jury, accepted and recorded by the court.

"Secondly, he has not been convicted of any offence in any other mode authorized by law.

"Thirdly, he has been acquitted of the offence charged in the indictment by the verdict of a jury accepted and recorded by the court.

"Fourthly, the indictment is in other respects informal and defective.

"But the court overruled the motion. To which opinion, direction and judgment of the court the defendant excepts."

S. H. Phillips, for the defendant. The defendant has not been convicted of the offence for which he was indicted, either by confession of his guilt in open court, by admitting the truth of the charge against him by plea or demurrer, or by the verdict of a jury, accepted and recorded by the court; and no sentence can therefore be passed upon him. *Rev. Sts. c. 123, § 3. Declaration of Rights, art. 12.* He has not been convicted of the offence charged in the indictment. *Rex v. Holt*, 7 Car. & P. 518. *Regina v. Ryan*, 2 M. & Rob. 213. Archb. Crim. Pl. (10th ed.) 439. 1 Russell on Crimes, (7th ed.) 741, 742. The verdict returned was a special verdict. *Dyer v. Commonwealth*, 23 Pick. 402. *Commonwealth v. Call*, 21 Pick. 509. A verdict in a criminal case cannot be amended.

The Commonwealth has relied on the *Rev. Sts. c. 137, § 11*, providing that "whenever any person indicted for felony shall on trial be acquitted by verdict of part of the offence charged

in the indictment, and convicted of the residue thereof, such verdict may be received and recorded by the court; and thereupon the person indicted shall be adjudged guilty of the offence, if any, which shall appear to the court to be substantially charged by the residue of such indictment, and shall be sentenced and punished accordingly." But it is submitted that that statute is unconstitutional, as conflicting with art. 12 of the Declaration of Rights, which declares that "no subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him." See also 1 Chit. Crim. Law, 644; Bac. Ab. Verdict, D; *Commonwealth v. Call*, 21 Pick. 513; *Regina v. Bird*, 5 Cox C. C. 20.

It results, therefore, that the verdict in question is a substantial acquittal. Rev. Sts. c. 123, § 4.

J. H. Clifford, (Attorney General,) for the Commonwealth.

THOMAS, J. 1. The indictment charges an assault with intent to murder. It is plain that the jury intended to find the defendant guilty of the assault without the felonious intent. In the entry of the verdict by the clerk, the words "and battery" were inadvertently included; the jury, as the report shows, "having found nothing as to a battery." The entry was amended during the sitting of the court, to conform to the truth. That the entry was rightly corrected we have no doubt. *Commonwealth v. Stebbins*, 8 Gray, 492. *Regina v. Vodden*, 1 Dearsly, 229, and 6 Cox C. C. 226.

2. The verdict as corrected is a good general verdict, with a qualification negating the felonious intent. *The King v. Williams*, 2 Campb. 646. *Commonwealth v. Dyer*, 23 Pick. 404.

If, as suggested by the learned counsel for the prisoner, the verdict is to be deemed a special one, it is nevertheless the corrected entry that is the evidence of such verdict. The entry as amended shows a sufficient verdict.

3. The defendant was convicted of a simple assault. He was charged with an assault with an intent to murder. The jury have found him guilty of the assault, but have negated the felonious intent. It is objected that the defendant was not convicted of the offence charged in the indictment. He was

Hodges & others v. Pingree.

convicted of an assault included in the charge on the face of the indictment, and which constituted part of the transaction prosecuted as felony. The case seems to us to fall clearly within the provision of the Rev. Sts. c. 137, § 11. *Commonwealth v. Fischblatt*, 4 Met. 354. *Commonwealth v. Drum*, 19 Pick. 479. *Commonwealth v. Goodhue*, 2 Met. 193. 2 Bennett & Heard's Lead. Crim. Cas. 457.

4. To the suggestion that the provision of the revised statutes is unconstitutional as in conflict with art. 12 of the Bill of Rights, the answer is that the offence is "fully and plainly, substantially and formally" described; that the whole may include a distinct part, and the greater the less.

Exceptions overruled.



JOHN HODGES & others vs. DAVID PINGREE.

Before the St. of 1854, c. 74, a bill in equity could not be maintained by one tenant in common against another for a partition of a wharf and appurtenant rights, and for an account of the profits received by the defendant while in possession of the estate; but might for an account, on striking out the prayer for a partition.

BILL IN EQUITY, filed before the passage of St. 1854, c. 74, by the executor and devisees named in the will of Gamaliel Hodges, alleging their seisin of an undivided part of a wharf lot, with rights of wharfage and dockage, and Pingree's seisin of the remaining part; Pingree's use of the wharf for the purpose of laying at it vessels of his own and under his charge, and landing merchandise thereon, and depositing thereon materials and rigging for his vessels; his receipt of all the rents and profits of the wharf; his promise to Gamaliel Hodges to account for all business done at the wharf, and to take charge thereof for all interested therein; and his insolvency and refusal to render any account. The bill prayed for a discovery, an account, a commission to make partition of the premises, and for general relief. The defendant demurred generally.

Hodges & others v. Pingree.

N. W. Hazen, for the defendant.

S. H. Phillips, for the plaintiffs, cited *Rev. Sts. c. 81, § 8; c. 103, §§ 25, 26; 1 Story on Eq. §§ 67, 71, 80, 441, 466, 518, 655, 656; Fanning v. Chadwick, 3 Pick. 420; Goodrich v. Staples, 2 Cush. 258; Armstrong v. Gilchrist, 2 Johns. Cas. 431; Russell v. Clark, 7 Cranch, 69; May v. Parker, 12 Pick. 34, Adam v. Briggs Iron Co. 7 Cush. 361; De Witt v. Harvey, 4 Gray, 486; Clapp v. Shephard, 23 Pick. 228; St. 1854, c. 74.*

SHAW, C. J. This is a suit by one tenant in common against his cotenant, with two objects; one to obtain partition of real estate; and the other to have an account of the profits received by the defendant during his past occupation of the premises. These two subjects are entirely distinct.

With regard to the partition, there is a complete and adequate remedy at common law; and if by reason of the rights of wharfage and dockage, the premises cannot be divided without damage to the owners, the whole estate may be set off to any one of the parties who will accept it, he paying such sums of money, by way of owelty, as may be awarded by the commissioners. *Rev. Sts. c. 103, § 25. St. 1850, c. 239.*

The partition being apparently the leading object of the bill, the demurrer is well taken. It is said that the court, having once acquired jurisdiction of the case, will retain the case, to do complete justice between the parties. That is true, so far as concerns matters incidental to the subject of which the court has jurisdiction, and which must be disposed of in order to enable the court to enter a decree in the matter of which it has jurisdiction. *Holland v. Cruft, 20 Pick. 321.* But here the suit for an account does not draw after it, or make it necessary to consider, the question whether partition shall be had. The two things are incompatible. So far, therefore, the demurrer must be sustained.

But we are of opinion that the bill, if amended by striking out all relating to a partition, might be maintained as a bill in equity for an account. *Plaintiffs have leave to amend.*

STEPHEN G. WHEATLAND vs. JOHN A. LOVERING.

The *St.* of 1855, c. 194, by which this court "shall have jurisdiction in equity in all cases of fraud," confers no jurisdiction over suits commenced after its passage, and before "took effect.

ACTION OF TORT, under *St.* 1853, c. 371, praying for relief in equity, brought by the assignee of an insolvent debtor to set aside a conveyance obtained from said debtor by false representations and in fraud of his creditors. Writ dated and served April 17th 1855. The defendant on the 7th of November 1855 filed a general demurrer.

S. C. Bancroft, for the defendant.

S. H. Phillips, for the plaintiff.

DEWEY, J. This demurrer must be sustained, this court having at the time of the institution of the present action no general jurisdiction over frauds, that would authorize giving the relief in equity here prayed for. *Holland v. Craft*, 20 Pick. 321. Nor can this action be maintained under the provisions of the *St.* of 1853, c. 371.

The only ground upon which the plaintiff has supposed his action might be maintained we understand to be that the recent *St.* of 1855, c. 194, has given to this court "jurisdiction in equity in all cases of fraud." This provision is certainly broad enough to include cases of fraud which had not been before embraced in the jurisdiction conferred on this court as a court of equity. But this statute did not take effect until the 14th of May 1855, twenty seven days after both the date and the service of the writ in the present case. Ordinarily the time of making the writ is to be taken as the time of the institution of the suit.

Although the principle has not been departed from, yet it has been held under peculiar circumstances, as in a writ of replevin where the writ was actually made before the property was demanded, but it was shown that the writ was placed in the hands of the officer with directions to make such demand before making a service, that the action should be considered as com-

Wells & Prince v. Heath.

menced after the demand was made. *Badger v. Phinney*, 15 Mass. 364. Also where a writ against the indorser of a note was delivered to an officer, with instructions not to serve it until after he had given the indorser notice of the non-payment of the note by the maker, and the writ was not in fact served until such notice was given, it was held that the action was not commenced until the service of the writ. *Seaver v. Lincoln*, 21 Pick. 267. Neither of these cases gives any countenance to the idea that, under any circumstances, the writ can be considered as made at a later period than that of the actual service of the process. The case of *Swift v. Crocker*, 21 Pick. 242, seems to be directly to the point that when the service has been made, either wholly or in part, the suit must be deemed to have been commenced, and it cannot embrace any cause of action accruing subsequently to the service.

We must therefore hold that the present action was commenced on the 14th of April, that being the day of the date of the writ, and also the day when service was made thereon. But upon that day this court had no jurisdiction of the case, and no such action could properly be instituted. The *St.* of 1855, c. 194, authorized subsequent actions, but gave no vitality to those commenced before the statute took effect. *Demurrer sustained*

NATHANIEL WELLS *vs.* JOHN HEATH.

JOHN PRINCE *vs.* SAME.

A testator devised his farm to the selectmen of a town "and their successors in office forever," in trust "yearly and every year to appropriate and pay all the rents, incomes and profits of the said farm for the support of a gospel minister or ministers in said town, of the Congregational denomination; the said selectmen to be always accountable to said town, and to render to said town annually, and as much oftener as said town may require, a true and faithful account of all their proceedings relative to said farm;" "subject however to these directions and restrictions:" that in case of strip or waste, or of misappropriating any part of the income, or of the selectmen's refusal or neglect to render an account to the town, then the two oldest persons in the nearest degree of kindred to the testator within the county might proceed to settle the matter by submission to arbi-

Wells & Prince v. Heath.

tration, and, if the selectmen should neglect for six months to pay to said kindred any sum awarded, "the said two of my said kindred shall forthwith take possession of my said farm; and the said farm shall descend thenceforward to them, in equal shares, to have and to hold the same to them and their heirs and assigns forever; and the term of said selectmen and of said town in said farm shall thenceforward and forever cease and expire." At the time of the execution of the will there was but one religious society in the town. *Held*, that this devise was not for the benefit of the Congregational minister or ministers in the town, but for the benefit of the inhabitants of the town in their parochial capacity, and, upon their subsequent legal organization as a separate corporation, in trust for the parish; that the selectmen took an estate in fee, and not a life estate upon condition; that the executory devise to the testator's next of kin was void as tending to create a perpetuity; that the legislature might provide by law for the election of new trustees by the parish; and that a sale by such trustees, under license granted by this court, pursuant to *St.* 1846, c. 244, passed a good title as against all parties.

WRITS OF ENTRY to recover parts of a farm in Topsfield, of which Daniel Bixby died seised in 1825. The first demandant was an heir at law of said Daniel; and the second, an heir at law of Ruth Bixby, his widow and residuary legatee. By his will, made in 1811, he devised the farm in question to his said widow for life, and, after her, to his nephew Daniel Towne for life, and then as follows:

"I give and devise to the selectmen of the town of Topsfield aforesaid, and their successors in office forever, all my farm, situate in Topsfield aforesaid and in Boxford in said county, after payment of the debts, charges and legacies hereinbefore mentioned, and after the terms of my said wife and nephew therein, as hereinbefore expressed, shall have fully expired and run out; to have and to hold the same to the said selectmen and their successors, on the special trust and confidence here following, that is to say: that the said selectmen and their successors shall from time to time lease out the said farm for a term not more than seven years, nor less than three years, extraordinaries excepted; and shall yearly and every year appropriate and pay all the rents, incomes and profits of the said farm for the support of a gospel minister or ministers in said town of Topsfield, of the Congregational denomination; the said selectmen to be always accountable to said town of Topsfield, and to render to said town annually, and as much oftener as said town may require, a true and faithful account of all their proceedings relative to said farm; the said farm to be called and known by the name of the

Donation Farm for the support of the gospel ; subject however to the directions and restrictions hereinafter mentioned."

" My will is, and I hereby further order and direct, that, after the said selectmen shall come into possession of my said farm, as hereinbefore provided, they shall be allowed to cut not exceeding six cords of wood in any one year; and it shall be the duty of those who may be in the nearest degree of kindred to me to see that the said selectmen at all times cause the buildings and fences on said farm to be kept in good repair, and that said farm be well managed for the purpose for which it is given. And if any strip and waste be made of said farm, or any part thereof, while under the care of said selectmen; or if any part of the rents, incomes and profits of said farm shall at any time be appropriated for any other purpose than that for which it is hereby given and intended; or if said selectmen shall refuse or neglect to render to said town of Topsfield a true and faithful account of their proceedings in the premises as hereinbefore required; then the two oldest persons in the nearest degree of kindred to me, living within the present limits of the said county of Essex, shall give notice to said selectmen; and after six months, if they still see cause, shall proceed to settle the matter in manner following: The said two of my kindred shall appoint one disinterested judicious freeholder, and the said selectmen shall appoint a second; and they two shall decide, or, in case of disagreement, they shall together appoint a third to join them; and the decision of the two persons so appointed, or of the three persons so appointed, or a majority of them, as to the damage sustained by such strip and waste, or bad management, shall be final; and the said selectmen shall pay to said two of my kindred such sum as the referees shall decide, within six months after such decision; or, on failure of such payment within that time, the said two of my said kindred shall forthwith take possession of my said farm; and the said farm shall descend thenceforward to them, the said two of my kindred in the nearest degree and living within the limits aforesaid, in equal shares; to have and to hold the same to them and their heirs and assigns forever; and the term of said selectmen and of said town in

said farm shall thenceforward and forever cease and expire. And if the said selectmen shall, for thirty days after due notice of the appointment of the first person by said two of my kindred as herein provided, refuse or neglect to appoint the second, as herein provided, the said two of my kindred may make known such refusal or neglect to the judge of probate for the time being for said county of Essex; and three disinterested judicious freeholders, appointed by said judge, shall in the same manner decide, and their decision shall be equally and in the same manner binding, as if the referees had been appointed in manner before provided."

Ruth Bixby entered on the premises after the testator's death, and occupied them until her own death in 1834; then Daniel Towne, the testator's nephew, entered and occupied till his decease in 1845, after which the selectmen of Topsfield entered, and in 1846 were appointed by the judge of probate trustees of the estate under the will, and leased it for seven years.

In 1800 and previously the inhabitants of the town of Topsfield acted as a parish, raising money for the support of a minister of the gospel, and instructors in piety, religion and morality, and (excepting those who legally separated themselves and joined other parishes or religious societies) continued to exercise all the functions of such a corporation until the 29th of March 1824, when the parties remaining connected with such parish were duly organized under *St. 1823, c. 117*, which enacted that "all the inhabitants of the town of Topsfield, with all the lands in said town, (except such inhabitants and such lands as do belong to some other parish or religious society, or are exempt by law from parish charges in said town of Topsfield,) be and they hereby are incorporated into a parish, by the name of the Congregational Parish in Topsfield, subject to all the duties and vested with all the rights and privileges to which parishes are by law entitled;" "and the said congregational parish shall be deemed and taken to be successors to the said town of Topsfield, as far as related to parochial proceedings, rights and privileges, and subject to all contracts of a parochial nature which may have been made by said town."

The new corporation retained the former minister, without any new installation, continued him in the occupation of the parsonage lands, and retained and used the church plate. The ecclesiastical affairs of the parish, both before and since this incorporation, have always been conducted according to the Congregational system of church government, and Orthodox or Calvinistic tenets have always been professed by the members. The testator was always a deacon in the old parish, and, so long as physically able, attended public worship at their meeting house. None of the ministers of the town living at the time of his death were living when these actions were commenced. The net income of the farm since Daniel Towne's death has been appropriated to the support of the minister of the Congregational Parish.

In 1847 that parish duly accepted the *St.* of 1847, c. 231, which provided for an election by them of trustees, "members of said parish, who, with their successors, shall thereafter be constituted a body corporate, by the name of the Trustees of the Bixby Donation Farm, for the support of a gospel minister or ministers in the town of Topsfield, of the Congregational denomination;" and "have the power to take and hold, and shall take and hold, all that farm and estate devised to the selectmen of the town of Topsfield by Daniel Bixby, subject to all the restrictions and trusts mentioned in said will; shall apply the incomes and profits thereof according to the directions in said will; and shall hold and administer said estate in all respects according to the terms, provisions and directions of said will, except that said trustees shall not be accountable to the said town, and shall not be required to make any reports of their doings to said town; but shall be accountable to said parish, and make all such reports to said parish annually or oftener, as by the terms of said will were required to be made to said town;" and "in all other particulars said trustees shall take the place of said selectmen, and shall perform and discharge all the duties and be subject to all the liabilities of the said selectmen, as provided for in and by said will."

Trustees were duly elected under this statute by the parish, and

appointed by the judge of probate, and accepted the trust and entered upon the premises, and in 1853 demised them for a term of three years, by a lease which provided that the lessee might cut not exceeding nine cords of pine wood from the farm yearly; and the lessee did cut nine cords of hard and soft wood yearly.

At November term 1855 of this court said trustees, upon their petition pursuant to a vote of the parish, were authorized to sell and convey the estate, and to invest the proceeds subject to the same trusts and uses as the original trust; and in May 1856 sold the estate and conveyed it by warranty deed to the tenant in these actions.

If on the foregoing facts the demandant in either action was entitled to recover, the tenant was to be defaulted. If the demandant in neither action was entitled to recover, judgment was to be for the tenant, unless it was competent for the demandants to show that from 1812 to 1830 there was another Congregational society in Topsfield beside the old town society; that from 1833 to 1836 there was another similar Congregational society; that the farm had not been managed according to the rules of good husbandry; that after the death of Daniel Towne the selectmen had allowed the farm to be held by a tenant at will for no fixed rent; and that the annual reports of the trustees had been made to the parish, and not to the town; in which event the case was to stand for trial.

T. P. Pingree, Jr., for the demandants.

S. H. Phillips, (*W. G. Choate* with him,) for the tenant.

MERRICK, J. The premises demanded in these suits constitute the farm formerly owned by Daniel Bixby. By his will he devised the same, subject to the life estates of his wife and nephew, and also to certain specified directions and restrictions, to the selectmen of the town of Topsfield, on the special trust and confidence that they should yearly and every year appropriate and pay all the rents, income and profits of the farm for the support of a gospel minister or ministers in that town of the Congregational denomination. The demandant Wells is one of the heirs at law of the testator, and claims to be entitled in that capacity to maintain this action. He insists that the

devise to the selectmen of Topsfield was wholly inoperative and void, or that it was a devise to them of a life estate only, or that it was a devise upon certain conditions which have not been kept, and that by the breach thereof the devisees have forfeited their estate, and that the title thereto has consequently become vested in the heirs at law of the testator. The demandant Prince contends that, by force of the residuary clause in the will, the estate was devised to Ruth Bixby, under whom, as one of her heirs at law, he endeavors to establish a title to it in himself.

There is no difficulty in ascertaining from the language and provisions of the will the meaning of the testator, or what was his intent and purpose in the devise to the selectmen of Topsfield. He obviously intended to afford permanent assistance to the inhabitants of that town in the support of a religious teacher of the Congregational denomination. The devise was in substance a gift to them; they were the *cestuis que trust*, and were to enjoy exclusively the benefits and advantages of the estate devised, for whose sole use and advantage it was taken and held by the devisees. It was thus given to the inhabitants of the town, and not to those who for the time being were there the minister or ministers of the gospel. *Emerson v. Wiley*, 10 Pick. 317. This is apparent from the provision that the selectmen are always to be accountable to the town for their conduct and proceedings in their management of the farm, and are to render annually to the town, and as much oftener as the town shall require it to be done, a true and faithful account of all matters pertaining to the trust estate. And that it was the intention of the testator that the real and substantial interest in the estate devised should be in the town is apparent also from his express declaration in another part of the will, that as soon as the two persons in the nearest degree of kindred to him should take possession of the estate under the executory devise to them, the term of the town, as well as of the selectmen, should thenceforth and forever cease and expire.

But the devise was to the selectmen to hold the estate devised to them in trust for the town in its parochial capacity.

At the time of the execution of the will there was but one religious society in the town of Topsfield, and according to the well settled principles of law pertaining to those matters, the town was then obliged to maintain and support public worship and perform all parish duties; and was in all respects in relation to the support and maintenance of public worship to be considered a parish until the formation of a new one within its territorial limits. When the Congregational Parish in Topsfield was organized on the 29th of March 1824 under the *St.* of 1823, c. 117, it succeeded to all the parochial property, rights, duties, and liabilities of the town. *Dillingham v. Snow*, 5 Mass. 547. *First Parish in Brunswick v. Dunning*, 7 Mass. 445. *Austin v. Thomas*, 14 Mass. 333. *First Parish in Shrewsbury v. Smith*, 14 Pick. 297. *Ludlow v. Sikes*, 19 Pick. 317. *Lakin v. Ames*, 10 Cush. 198. The trustees thenceforward held the devised estate in trust for the newly incorporated parish.

The devise to the selectmen of the town of Topsfield was a good and sufficient description of the persons who were to take the estate as devisees. It is clear that any words which are sufficient to denote the persons meant by the testator, and to distinguish them from all others, will secure to them the property or estate which may be given them in a will. 6 Cruise Dig. tit. 38, c. 10, § 27 & *seq.*

But it is objected by the demandants that if the individuals designated as the selectmen of Topsfield could take the estate devised to them, they took it only for life and not in fee, because there were no words of inheritance annexed to the gift. The devise is, in terms, to the selectmen of the town of Topsfield and their successors in office forever. It is certainly true, as contended by the demandants, that the selectmen of a town do not in any sense constitute a corporation, and that a gift or conveyance, in general terms, to them and their successors in office, whether by deed or devise, does not create an estate in fee, but for life only. But this devise under the will of Bixby to the selectmen of Topsfield was not a gift to them to their own use, but in trust for others. And it is an established rule of law that where an estate is granted to one or more persons in trust, with

out words of limitation to heirs and assigns, and the trust is of such a nature that, to support and carry it into effect, a legal estate in the trustee, which will or by possibility may exceed the life or lives of the trustee or trustees, is required, the law will construe the estate to be in fee. *Attorney General v Federal Street Meeting-house*, 3 Gray, 48. *Cleveland v. Hallett*, 6 Cush. 406.

Applying this principle to the devise of the farm to the selectmen of Topsfield, when considered in reference to all the provisions in the will concerning it, there can be no doubt but that the estate in fee simple vested in the trustees. All the provisions in the will show that it was the intention of the testator that the devised estate should be permanently appropriated to the sole and exclusive use of the *cestuis que trust*. The farm is given to the selectmen and to their successors in office forever. They are yearly and every year to appropriate and pay over the rents, income and profits of it for the support of a gospel minister; and they are annually, forever, without any limitation of time, to render just and faithful accounts of their proceedings in relation to the estate to a corporation which has perfect existence. And in order to secure to the *cestuis que trust*, who are the objects of his bounty, the uninterrupted and perpetual enjoyment of the estate devised, and of all the income and profit which may be derived from it, the testator endeavors to make certain the fidelity of the trustees by exposing them to prescribed penalties if they should fail to perform their duty according to the directions and instructions particularly specified in his will.

To the same end and for the same purpose also are all its provisions in relation to the executory devise over to the two persons nearest to him in kindred who shall be living in the county of Essex when his directions shall cease to be observed. It is true that this executory devise is wholly ineffectual and inoperative, because the estate will not necessarily come to vest in the executory devisees within the time prescribed as the rule to prevent the creation of perpetuities; for it would be impossible of course to foresee, when the estate was taken by the trustees, within what time any of these contingencies would

occur, upon the happening of which the executory devise was to take effect. It might not happen until after many generations should have passed away. 6 Cruise Dig. tit. 38, c. 18, §§ 20, 21. *Brattle Square Church v. Grant*, 3 Gray, 142. But this provision, like everything else contained in the will, evinces clearly the intention of the testator to make the devise in favor of the *cestuis que trust* a perpetual benefit, and shows that an estate which may, and in the contingencies provided for necessarily must, exceed the life or lives of any designated trustee or trustees, is indispensable to carry the trust fully into effect. The devise therefore in the will of Bixby to the selectmen of Topsfield gave to them the estate in fee simple.

It is a mistake to suppose that the estate thus devised was given, as the demandants contend, upon any condition, the nonperformance of which might cause a forfeiture of the estate of the devisee. No such condition was annexed, or attempted to be annexed, to the estate by the testator. A condition, or the benefit of a condition, can be reserved only to the donee, feoffee, devisee or his heirs. 2 Cruise Dig. tit. 13, c. 1, § 15. *Hayden v. Stoughton*, 5 Pick. 528. The testator, so far from reserving or attempting to reserve the benefit of any condition to himself or to his heirs at law, makes a special and particular provision for the express purpose of preventing the estate from returning to or becoming vested generally in his heirs. That is to say, he prescribes upon the occurrence of certain contingencies that it shall be taken possession of by the two persons nearest in kindred to him who shall then happen to be residents in the county of Essex, and shall thenceforward descend to them and their heirs as absolute owners in equal shares. As it thus appears that the whole estate was devised; that there was no condition annexed to it; that the executory devise over was inoperative and void; and that the full execution of the trust created by the will required an estate exceeding in duration the lives of the trustees named; the conclusion is inevitable, that no forfeiture has been incurred, but that the selectmen of the town of Topsfield took an estate in fee simple in the farm devised to them.

From these considerations it appears that neither of the de-

mandants ever had or acquired any title whatever to the demanded premises; and it would therefore seem to be quite unnecessary to inquire whether the proceedings under which the tenant claims to be the lawful owner thereof were regular and correct. It is sufficient to defeat these actions, that he is in possession claiming title under a deed of conveyance, and that the demandants show no right to the estate in themselves. But we may add very briefly that we perceive no want of lawful authority in the grantors to make the conveyance. By the *St.* of 1847, c. 231, a new mode of appointing trustees is provided for. That mode has been strictly pursued, and it is not suggested that the provisions upon this subject have in any particular been disregarded. In all other respects the statute leaves the rights of the parties in interest just as they existed under the will. After the new trustees were appointed, they, being by virtue of the provisions of the statute the owners in fee of the demanded estate, but in trust under the will of Bixby for the then existing Congregational Parish in Topsfield, did, at the request of that parish and in pursuance of its votes in relation thereto, apply to this court for license to make sale of the real estate, and to hold the proceeds of such sale in lieu thereof and upon the same trust as they held said estate. Due proceedings were had upon that application, and the license prayed for was granted. This was a judicial decree upon a subject within the proper jurisdiction of the court; and therefore it is to be regarded as an adjudication conclusive upon all parties. *St.* 1846, c. 242. The trustees, deriving their right under the license thus given them, and acting with the express consent and in conformity to the expressed wish of the *cestuis que trust*, sold and conveyed the estate to the tenant, and he thereby acquired a complete and perfect title to it.

Pursuant to the agreement of the parties, judgment must be entered for the tenant, as it is apparent from the views already taken that the further facts which the demandants offered to prove are immaterial to the issue, and, if established, could not in any degree affect its determination.

Judgment for the tenant.

SOLOMON PARKS vs. CITY OF NEWBURYPORT.

The passage of water from rain and melting snow over the surface of land for twenty years gives no right to its continuance.

ACTION OF TORT. The declaration alleged that there ever had been a passage for water over the land of the defendants, which the plaintiff had a right to have open, and that the defendants within one year of the date of the writ had obstructed said passage way so as to turn the water upon the plaintiff's land, by reason whereof the plaintiff's well was destroyed.

At the trial in the court of common pleas, it appeared that the plaintiff's land and the defendants' land adjoined each other and were situated on the southwest side of Purchase Street in Newburyport; that the defendants' land was not fenced towards the street, and had been for an indefinite number of years used as a school yard, in which were two school-houses; that the two lots were on about the same level, and for most of the year were dry and free from water; that the land surrounding them was generally level, but ascending gradually to the southwest; and that in periods of heavy rain, and in the spring of the year, when the snow and ice were broken up, the water from the higher lands in the rear passed off toward the Merrimac River over the defendants' land. The defendants two years ago built an engine-house on their lot, and made an embankment around it.

The plaintiff contended, that by reason of filling in the dirt around the engine-house the water which collected in the spring was not allowed to flow off into the street, but was turned upon the plaintiff's land, and did the injury complained of. The defendants contended that the plaintiff had proved no cause of action. But *Morris*, J. instructed the jury, "that if, for a period of twenty years prior to the act complained of, the water accumulating on the land in the rear of the lots in question had been accustomed to find its outlet over the land of the defendants, and the same had been obstructed by the acts of the defendants

Dewing v. Durant.

in such a way as to turn it from their own land across the plaintiff's, and occasion a substantial injury to the property of the plaintiff without any fault or want of care on his part, then the defendants would be liable." The jury found a verdict for the plaintiff, and the defendants alleged exceptions.

E. F. Stone, for the defendants.

O. P. Lord, for the plaintiff.

BY THE COURT. The declaration is for obstructing a watercourse, and the instruction allowed the jury to find for the plaintiff, though there was no watercourse. No action will lie for the interruption of mere surface drainage. *Luther v. Winnisimmet Co.* 9 Cush. 171. *Ashley v. Wolcott*, 11 Cush. 192.

Exceptions sustained.

SETH DEWING vs. ADOLPHUS DURANT.

After a levy of an execution upon an equity of redemption in real estate by sale in a manner not authorized by law, the judgment creditor may obtain a new execution by *scire facias*, under Rev. Sta. c. 73, § 21.

SCIRE FACIAS, sued out on the 21st of December 1855, to revive a judgment obtained by the plaintiff, and Joseph Foster, since deceased, against the defendant, and to obtain an alias execution thereon. The parties submitted the case to the judgment of the court upon the following facts :

One execution, issued upon the judgment, was levied upon land the title to which stood upon the records in the name of the defendant's wife and of George Cutter, and which was then under mortgage; and the right in equity of redeeming the land from that mortgage was sold by auction on the execution, and purchased by Foster, who within a year thereafter brought a writ of entry against Adolphus Durant, his wife and George Cutter, to recover the land, upon the ground that the conveyances of land to Mrs. Durant and to Cutter were fraudulent

Dewing v. Durant.

and void as against Durant's creditors, having been made with the design and for the purpose of fraudulently securing it from attachment, and for the purpose of delaying and defrauding his creditors, and that the demandant was therefore entitled to recover the land, under the provisions of *St. 1844, c. 107*. But this court, as appears by the report of *Foster v. Durant*, 2 Gray, 538, held that the demandant could not recover, because the execution had been levied by sale of the equity, and not by appraisement and setting off on execution; and on the 20th of June 1855 entered judgment for the tenants.

J. W. Perry, for the plaintiff.

N. W. Harmon, for the defendant. The plaintiff cannot maintain this suit. 1st. Because from the facts agreed it appears that the execution has been paid in full to the judgment creditors, and they could not, after the sale on execution, be interested as such judgment creditors in the amount which one of them might realize, as purchaser, out of his purchase. 2d. Because § 21 of c. 73 of the Rev. Sts. giving the judgment creditor this remedy of *scire facias*, "if, after the execution is returned or recorded, it shall appear that the estate levied upon was not the property of the debtor, or not liable to be seized on the execution, or that it cannot be held thereby," does not apply to a levy by seizure and sale of an equity of redemption, but only to a taking and setting off by metes and bounds. And there is no decision contrary to this position; for in *Perry v. Perry*, 2 Gray, 326, the only point decided was that an action of contract would not lie on the judgment, when the previous levy was utterly void.

METCALF, J. The court cannot perceive any distinction, which will avail the defendant, between this case and that of *Perry v. Perry*, 2 Gray, 326. If there is any distinction between the two cases, the present case is the strongest for the plaintiff. For, as was decided in *Foster v. Durant*, 2 Gray, 538, the proceedings under the original execution were utterly void. There was, in law, no levy at all on the equity of redemption which the officer undertook to sell and convey to Foster. Whereas, in *Perry v. Perry*, the mode of levy was right, and the execution

Jewett v. Jewett.

would have been actually satisfied, if the equity of redemption which was levied on and sold, had belonged to the execution debtor.

It is contended for the defendant, that the only adjudged point, in *Perry v. Perry*, was, that an action of contract on the judgment would not lie in such a case; and that the question, whether *scire facias* could be maintained, is still open. But the court there decided, (after an argument, which was the same, in substance, as that which has now been presented to us,) that debt would not lie on the judgment, *for the reason* that no common law remedy, in the case, existed in this commonwealth, nor any statute remedy besides that given by the Rev. Sts. c. 73, which was the remedy by *scire facias*. And we see no reason for changing the opinion then formed and announced.

Alias execution awarded.

WILLIAM JEWETT vs. JAMES JEWETT.

Under *St. 1840, c. 97*, providing that a sale of real estate by an executor or administrator under a license shall be valid as against any person claiming under the deceased, though the deed is not delivered within a year, if certain conditions are complied with and the price "duly accounted for," such accounting must be shown by the probate records.

A remainderman, during the continuance of the life estate, is under "legal disability" within the meaning of *St. 1817, c. 190, § 12*, so that he may bring an action within five years after the termination of the life estate to recover land sold and conveyed by an executor under a license, more than five years before the commencement of the action.

WRIT OF ENTRY, dated October 20th 1855, to recover a lot of land in Georgetown. The case was submitted to the decision of the court on the following statement of facts:

Miriam Jewett died seised of the demanded premises in July 1826, and devised them to her son Samuel Jewett for life, "and, after his decease, to be equally divided among his children or their legal representatives." Samuel Jewett died in June 1849,

leaving the demandant, and one other surviving child, who died without issue in August 1850, aged nineteen years, and whose portion the demandant inherited.

The executor of Miriam Jewett's will, upon petition to the judge of probate, on the 7th of November 1826 obtained a license in due form to sell the premises within one year, to pay debts and legacies; and, after giving bond and notice as required by law, sold the same by auction in December 1826 to a *bona fide* purchaser, who actually paid the price; and in June 1828 executed and delivered a deed in due form to said purchaser, who was the tenant's grantor. The executor never rendered any account of his administration to the probate court, nor do the records of that court show any proceedings relative to said estate subsequently to November 1826. The tenant offers to show, if admissible, that all the legatees and creditors of the testatrix now living, mentioned in the schedule filed by said executor in the probate court, have been paid their respective claims. The tenant and his grantor have been in peaceable and uninterrupted possession of the demanded premises from the time of the sale to the date of the writ.

J. P. Jones, for the demandant.

J. A. Gillis, for the tenant.

METCALF, J. 1. By the law which was in force when the sale was made of these demanded premises, the license for the sale continued in force only one year from the time of granting it. *St.* 1817, c. 190, § 12, reenacted by Rev. Sts. c. 71. And unless the deed to the purchaser at the sale was executed and delivered within the year, he acquired no title to the land. *Macy v. Raymond*, 9 Pick. 285. The grantor of the present tenant therefore acquired no valid title to these premises, and could convey none to the tenant, by the mere legal effect of the license, sale and deed. And the demandant is entitled to recover, if he has seasonably commenced this suit, unless the tenant can hold the premises by virtue of the provisions of *St.* 1840, c. 97, which are these: "Whenever the validity of any sale of real estate, which has been or may be made by any guardian, executor or administrator, is drawn in question by any person claiming

under the ward or deceased, if the license, bond, oath and notice have been according to law, and the price for which the land shall have been bid off at auction has been paid by a *bona fide* purchaser, and duly accounted for, such sale shall be deemed valid, although the deed may not have been executed and delivered within the year from the granting of the license."

The only question that is now raised under this statute is, whether the tenant must show that the money received by the executor, on the sale of these premises, was accounted for by him in the probate court; or whether he may show, by parol evidence, that he paid that money in discharge of claims made upon his testator's estate. And a majority of the court are of opinion that the words "duly accounted for" mean accounted for according to the law for the settlement of executors' accounts of their administration; and that this must be shown by the tenant, as he must show that the license, bond, oath and notice were according to law. Those four things must be shown by the probate records or files. And so, we think, must be the executor's accounting for the price of real estate sold by him on license. We understand the effect of *St.* 1840, *c.* 97, to be this, namely, that the omission to execute and deliver a deed within a year after the granting of the license shall not render the sale invalid, if the proceedings have, in all other particulars, been conformed to the law. We cannot suppose that when it requires that the price should be duly accounted for, the legislature thereby meant that it might be accounted for in any other way than is prescribed, by other statutes, for the rendering and settlement of administration accounts, to wit, by presentment to the judge of probate, who is to give notice to all persons interested that they may appear and contest them, and who is to pass a decree allowing or disallowing them in whole or in part, subject to an appeal from his decree to the supreme court of probate. It is the policy of our law that the administration and disposition of the estates of deceased persons shall be open and public, before a judicial officer, and be found in public offices established for the preservation therein of all the authorized pro-

ceedings of such administration and disposition, either in the records or on the files in those offices. If the executor in this case had presented to the judge of probate, for allowance, an account of the matter which he now offers by way of duly accounting for the proceeds of the sale of these premises, we cannot know that it would not have been contested and disallowed.

We are not to be understood to decide that the price paid for land sold on an executor's license must necessarily be accounted for in the probate office before an action is brought by those who claim under the testator. They might bring an action before the price could be thus accounted for; in which case the tenant might doubtless show, in defence, that it was thus accounted for after action brought. How long after a sale this might be done, we need not now determine. It is sufficient for the decision of this case that the sale was made more than thirty years ago, and that there was no due accounting before this action was commenced, and has been none since.

2. The other question in the case is, whether this action was seasonably brought. And this depends on the provision in *St. 1817, c. 190, § 12*, that "no action by any heir or other person interested, for the recovery of any real estate sold under such license, shall be sustained, unless such action shall be brought within the term of five years after the execution and delivery of the deed given under such license: Provided always, that minors, and other persons under legal disabilities, may maintain such action at any time within the term of five years from the removal of their disabilities." See also *Rev. Sts. c. 71, § 37*. The court are all of opinion that the demandant is within this proviso or exception. The testator devised these premises to Samuel Jewett for life, remainder to the demandant and others; and Samuel Jewett died less than five years before this action was brought. The demandant had no seisin of these premises, nor any right of entry, which would have enabled him to maintain this action, until after the death of his father, the tenant for life. *Wells v. Prince*, 4 Mass. 67, 68. He was, therefore, under a legal disability, within the spirit and legal meaning, if not within

Rhoades v. Allen.

the strict letter, of the statute, and is not barred by the lapse of more than five years from the execution and delivery of the deed to the tenant's grantor.

Judgment for the demandant.

LOUISA A. RHOADES vs. NATHAN ALLEN.

A claim against an administrator, for services performed for his intestate's estate while under his charge, is not taken out of the statute of limitations by a letter from the administrator to the creditor, saying: "On reflection, I do not think what labor you performed for the estate would be worth \$100. Most of your labor was directly for or on account of the widow. My impression is, that you could not collect directly of me, as administrator, anything. It must be done through the widow. I do not mention this legal objection to get rid of anything, but to direct you in settlement with the widow. When the matter comes up, I shall be disposed to do what is right and just. I think you had better do something at once towards settlement with the widow, as I want to square up things all round."

ACTION OF CONTRACT for services claimed to have been rendered by the plaintiff to the defendant while the latter was administrator of the estate of Dr. Spaulding, more than six years before the date of the plaintiff's writ. The defendant pleaded the statute of limitations, which was admitted to be a sufficient bar to the action, unless the following letter, which was written and received within six years of the commencement of the action, was a sufficient acknowledgment or new promise to interrupt the operation of the statute:

"Lowell, April 2d 1851.

"Miss Rhoades: I have time to write only a line. On reflection I do not think what labor you performed for the estate would be worth over \$75 to \$100, including board, in the whole. Most of your labor was directly for or on account of Mrs. Spaulding. Since seeing you, it has occurred to me that it is doubtful whether any legal claim can be made against me or the estate. I obtained a legal discharge by regular process of law; and my impression is that you could not collect directly of me, as administrator, anything. It must be done through

Mrs. Spaulding. I do not mention this legal objection to get rid of anything, but to direct you in settlement with Mrs. S. When the matter comes up, I shall be disposed to do what is right and just. I think you had better do something at once towards settlement with Mrs. S., as I want to square up things all round — Mrs. S. and Dr. U. soon. You must not use or refer to my advice in proceeding as to the price of labor against the estate, as that might show collusion. But when things are examined and exposed, as they probably will have to be, you will find me disposed to do right. I am full of business and schools; examinations every day. My visit to Salem was pleasant and satisfactory. Yours &c. N. Allen."

E. W. Kimball, for the plaintiff. Either an acknowledgment or a promise, in writing, is sufficient to take a debt out of the operation of the statute of limitations. Rev. Sts. c. 120, § 13. *Baxter v. Penniman*, 8 Mass. 133. *Bangs v. Hall*, 2 Pick. 368. *Whitney v. Bigelow*, 4 Pick. 110. *Woodbridge v. Allen*, 12 Met. 470. *Bell v. Morrison*, 1 Pet. 351. Story on Con. §§ 1013, 1014. This case shows both an acknowledgment and a promise. The words in the letter, "for the estate," are agreed to refer to services performed by the plaintiff for the defendant while administrator, and, taken in connection with the rest of the letter, admit an existing debt which had not been settled. The words "I will do what is just and right" contain a promise to pay. *Galway v. Barrymore*, 1 Dick. 163, quoted by Metcalf *arguendo*, in *Fiske v. Needham*, 11 Mass. 453.

S. H. Phillips & J. A. Gillis, for the defendant.

METCALF, J. The statute bar to the action is not removed by the defendant's letter to the plaintiff, which neither acknowledges that she has a legal claim against him, nor makes any promise to pay her claim. See *Bangs v. Hall*, 2 Pick. 368; *Bailey v. Crane*, 21 Pick. 323; *Purdy v. Austin*, 3 Wend. 187; *M Culloch v. Dawes*, 9 D. & R. 40; *Morrell v. Frith*, 3 M. & W. 402.

Judgment for the defendant.

ALBERT R. BREWSTER *vs.* JAMES W. BAILEY.

A notice, signed by a mortgagee of personal property, and delivered to a deputy sheriff who has attached the property on a writ against the mortgagor, is sufficient under Rev. Sts. c. 90, § 79, if it notifies him to deliver up the property, and describes the mortgage and the notes secured thereby, although it does not contain an express demand of payment. A demand of payment under Rev. Sts. c. 90, § 79, by a mortgagee of personal property on an attaching officer, may state the full amount of the debt, without deducting what the mortgagor might deduct on the ground of a usurious consideration.

ACTION OF TORT against a deputy sheriff for taking and carrying away chattels attached by him on mesne process against Jonathan J. Sawyer.

At the trial in the court of common pleas, the plaintiff, to prove his title, gave in evidence a mortgage of the property from Sawyer to himself to secure the payment of four notes for the sum of \$250 each, and interest; and testified that, at the time of giving the mortgage, Sawyer owed him \$476, and promised to pay him a bonus of \$24, if he would lend him \$500 more; that he accordingly lent him \$500, and the \$24 was included in the notes.

The plaintiff proved the delivery to the defendant of an instrument in writing, signed and sworn to by him before a justice of the peace, which was addressed to the defendant, and notified him to deliver up the property in question, "said property being mortgaged by said Sawyer to me by mortgage," (describing it,) "to secure the payment of four promissory notes" (described) and concluded, "and there is now justly and truly due to me upon said notes the sum of one thousand dollars and interest, being the full amount of said notes."

Briggs, J. instructed the jury that the delivery of this paper to the defendant was a sufficient demand as required by Rev. Sts. c. 90, §§ 78, 79; but did not instruct the jury whether the account in writing was upon the evidence a just and true account. The verdict was for the plaintiff, and the defendant alleged exceptions.

N. W. Harmon, for the defendant.

D. Saunders, Jr., for the plaintiff.

MERRICK, J. Two objections are taken to the proceedings in the court below ; but neither of them affords a sufficient reason for disturbing the verdict. Upon a proper construction of the written instrument which was signed by the plaintiff, and duly sworn to before a competent magistrate, according to his certificate thereto subjoined, its delivery to the defendant must be considered to be a substantial demand of payment from him ; and we are satisfied, in view of the facts set forth in the bill of exceptions, that it contained a just and true amount of the aggregate sum which was due upon the notes secured by the mortgage held by the plaintiff.

It is true that no demand of payment is expressed in direct terms in the written instrument ; but that is obviously the real effect and purport of it. It distinctly notified the defendant of the existence of the mortgage made by Sawyer, of the purpose for which it was given, of the property conveyed by it, and of the amount due upon the notes described in the condition of it. The object, purpose and meaning of this notice could not be mistaken. It was a claim to have the property delivered to the plaintiff, discharged and relieved from the attachment. And as it was liable to the debt of the plaintiff, and could be lawfully withheld from him under the attachment only upon condition that the debt secured by the mortgage should be first paid, the claim to be put into immediate possession of the property, accompanied by a full statement of all the facts and circumstances upon which the rights of both parties depended, comprehended by necessary implication a demand of the money which was due. That was sufficient, since no particular form of expression is requisite to constitute a demand of payment. Any language, which by a reasonable interpretation has that import, is as significant and effectual as the use of other words, however direct or explicit they may be.

The account stated of the amount of the debt then due to the plaintiff, and for which the property attached by the defendant was liable, was correct and true. Sawyer, the mortgagor, might indeed, if an action had been brought against him to recover

the contents of the several notes secured by the mortgage, have availed himself of the provisions of the statute respecting usury and the taking of unlawful interest, to diminish the amount of the plaintiff's claim. But this he has not done; nor is he required to do anything of the kind. He has a right to determine for himself whether, if called upon in a suit at law for payment, he will resort to any such defence to diminish the judgment which may be recovered against him. If he interposes no such objection, none of his creditors can do it for him or on his behalf. The statute does not invalidate a usurious contract, or render it wholly inoperative; but on the contrary expressly declares that no assurance for the payment of money with interest at a greater than the legal rate shall thereby be null and void. Rev. Sts. c. 35, § 2. The contract is a valid and legal obligation, subject only to the right given to the promisor to set off the prescribed penalty, when its amount has been duly ascertained, either as a complete or partial defence as the case may be. The sum of twenty four dollars, which Sawyer agreed to pay the plaintiff as a bonus for raising and loaning to him the sum of five hundred dollars, constituted a part of the consideration of the notes referred to and described in the written notice given to the defendant. But Sawyer makes no objection to the plaintiff's right to recover the whole contents of the notes without diminution; and the defendant in the present action has no authority to set it up or avail himself of it. As between him and the plaintiff therefore, the account stated in the written instrument delivered to him was just and true; and there was consequently no imperfection in this respect, in the notice which he received, to justify him in the detention of the property to which the plaintiff, upon the failure to pay him the amount of his debt, was entitled.

As the account rendered to the defendant was correct and right, it is wholly unimportant that the court omitted to give any instructions to the jury upon the subject. As a question of fact, it should properly have been submitted to their decision; and this we are to presume was done, as nothing to the contrary is shown in the exceptions. *Exceptions overruled.*

MARGARET HARRIS vs. INHABITANTS OF MARBLEHEAD.

A building committee of the selectmen of a town which had not been divided into territorial school districts selected a lot of land for a school-house, and, on the refusal of H., the owner, to sell it, applied to the selectmen to call a meeting of the town. At such a meeting, called "to see if the town will authorize the selectmen to select at their discretion a school-house lot," it was voted, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, from the land of H. heretofore selected by the town." *Held*, that this was not a sufficient designation of land by the town to authorize the selectmen to select out of it a school-house lot, under *St.* 1848, c. 237.

It seems, that a notice that the selectmen, in accordance with a vote of the town, will on a certain day lay out and assess damages for the taking of a lot of land, but not stating that it is for a school-house, is insufficient.

A town which, against the owner's will, illegally takes a lot of land for a school-house lot, and erects a school-house thereon, cannot be allowed anything for improvements, under the *Rev. Sta.* c. 101, §§ 19, 20.

WRIT OF ENTRY by the widow and devisee of Ebenezer R. Harris to recover a lot of land in Marblehead. Plea, nul disseisin. Trial before *Merrick*, J., who reserved the following case for the decision of the full court:

The plaintiff gave in evidence her husband's title and his devise to her. The tenants claimed title by virtue of proceedings under *St.* 1848, c. 237, and the acts in addition thereto, authorizing towns to take lands for school-houses; there being no territorial school districts in the town. The records of the town were put in evidence, showing a call of a meeting of the legal voters of the town on the 30th of July 1853, "to see if the town will authorize the selectmen to select at their discretion a school-house lot, for the purpose of placing a school-house thereon;" at which meeting the town voted, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, not exceeding in quantity forty square rods exclusive of the land occupied by the buildings, from the land of the heirs of the late Ebenezer R. Harris, heretofore selected by the town, situated on Mechanic's Square." No evidence was introduced of any previous selection by the town. But it appeared that before this meeting a building committee of the selectmen had designated a

portion of the demandant's land for a school-house lot, and offered to purchase it of her, but she refused to sell, and the committee then requested the selectmen to have this meeting called.

On the 8th of August 1853, the selectmen voted to "take the piece of land from the heirs of the late Ebenezer Harris, selected for a school-house lot, and pay two hundred and fifty dollars for the same."

On the 14th of October 1853, the selectmen of the town gave the following notice to the widow and heirs of Ebenezer Harris: "Please take notice that we, the undersigned, selectmen of Marblehead, in accordance with the instructions given us at a legal meeting of the inhabitants of the said town, will proceed to select, lay out, and assess the damages for taking a part of the lot of land, situated on Hayden's Hill, formerly so called, adjoining the lands of Samuel Manning and others, belonging to the heirs of the late Ebenezer R. Harris, at said lot, on Monday the twenty-fourth day of October inst. A. D. 1853, at two o'clock in the afternoon." At the time thus appointed, the selectmen proceeded to the land of the demandant, and staked off the lot in dispute, and tendered her the sum of two hundred and fifty dollars therefor, which she refused to accept; and the selectmen afterwards erected a school-house thereon, which has been since occupied as such by the town.

O. P. Lord & S. B. Ives, Jr., for the demandant.

S. H. Phillips & J. H. Robinson, for the tenants. By the Rev. Sts. c. 23, § 28, the inhabitants of any town "may, at any meeting called for that purpose, raise money for erecting or repairing school-houses in their respective districts," &c. &c.; "they may also determine in what part of their respective districts such school-houses shall stand, and may choose any committee to carry into effect the provisions aforesaid." By virtue of this statute the building committee were a legal committee to designate the place for a school-house.

"Whenever a suitable place shall have been designated, by any town or school district, for the erection of a school-house, agreeably to the provisions of the twenty-third chapter of the revised

statutes, and the owner of the land shall refuse to sell the same or shall demand therefor a price which in the opinion of the selectmen is unreasonable, the said selectmen, with the approbation of the town, may proceed to select at their discretion a school-house lot, and lay out the same." *St.* 1848, c. 237. Under this statute the designation to be made by the town is only a general designation of the place, out of which the selectmen must select a lot. And the acceptance by the town, at a meeting duly called, of the designation made by the building committee of the selectmen, is a designation by the town. The acts of the town meeting, called by the selectmen at the request of the building committee, who had designated the place and failed to purchase, were in accordance with the article in the warrant. *Blackburn v. Walpole*, 9 Pick. 97. *First Parish in Sutton v. Cole*, 3 Pick. 244.

The selection of a lot by the selectmen out of land already designated by the town was according to the requirement of *St.* 1848, c. 237; and "the approbation of the town" was sufficiently given by the vote of July 30th conferring authority on the selectmen. The selectmen duly gave notice to the owners, and appraised and tendered the amount of damages, and in all respects conformed to the *St.* of 1848, c. 237, and the fee thereby vested in the town. *School District in Norton v. Cope-land*, 2 Gray, 414. *Tyler v. Hammond*, 11 Pick. 220. That statute is a constitutional exercise of the power of the legislature to take land for public uses. *Boston & Roxbury Milldam v. Newman*, 12 Pick. 481. *Wayland v. County Commissioners*, 4 Gray, 500.

If the tenants cannot hold the premises, yet, having hitherto held them under the proceedings in question by a title which they had reason to believe good, they are entitled to compensation for their buildings and improvements. *Rev. Sts. c. 101, §§ 19, 20.*

THOMAS, J. Before any proceedings can be had under the *St.* of 1848, c. 237, and the *Sts.* of 1851, c. 186, and 1853, c. 149, and c. 347, in addition thereto, it is necessary that a suitable place shall have been designated by the town or school district

Harris v. Inhabitants of Marblehead.

for the erection of the school-house, agreeably to the provisions of c. 23 of the Rev. Sts.

By § 28 of that chapter the inhabitants of the district are to determine in what part of the district the school-house shall stand. By § 30, if the school district cannot agree upon a place, the selectmen of the town are to determine where it shall be placed. But towns may carry into effect the provisions of this chapter without forming school districts. § 24. So if school districts already exist, the town may, if it sees fit, carry into effect the provisions as to school-houses at the common expense of the town, and in such case the town may at any legal meeting raise money and adopt all other proper measures for this purpose. §§ 28, 32. The town of Marblehead so exercised this power of building the school-houses at the common expense.

As a necessary condition precedent to the exercise of the power conferred by the St. of 1848, it must appear that a suitable place had been designated for the school-house, and that the owner had either refused to sell, or demanded a price which in the opinion of the selectmen was unreasonable. Nothing can be more plain and explicit than the language of the statute § 1. Such designation of a suitable place for the school-house must be made at a legal meeting and by a vote duly recorded.

There is an entire failure to show any vote by the town, designating such suitable place for the school-house in question. The only meeting in which any action was had upon the subject is that of July 30th 1853. The article in the warrant was "to see if the town will authorize the selectmen to select at their discretion a school-house lot, for the purpose of placing a school-house thereon." The vote adopted was, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, not exceeding in quantity forty square rods exclusive of the land occupied by the buildings, from the land of the heirs of the late Ebenezer R. Harris, heretofore selected by the town, situated on Mechanic Square." "From land heretofore selected by the town"—when, at what meeting and by what vote, fails to appear

There is a recital of a selection — that is all. There is no evidence that such selection or designation was ever made; and it is, of course, for the tenants to show that the land was duly taken. In the absence of proof, we must presume it does not exist. The records given us of the earlier meetings show no action whatever on the subject of the lot for the school-house. The first and vital thing is wanting, that without which all the subsequent proceedings were useless ceremonies, to wit, the designation by the town of a suitable place.

If the vote of July 30th could be construed as authorizing the selectmen to designate a suitable place, it would not, we think, avail; for this is a discretion the town itself must use, and cannot delegate to its officers.

If we got beyond this point, there are other defects which would arrest our progress, and especially the insufficiency of the notice, in not stating the purpose for which the land was taken, or offering to the party a hearing.

A claim is made for betterments. Under the Rev. Sts. c. 101, §§ 19, 20, such claim may be made, provided the tenant holds under a title he had reason to believe good, that is, of whose defects he had no reasonable notice or warning. This does not apply to improvements made during the pendency of the controversy, and more especially where a party is taking land by force of the statute, and is bound to see that all the steps are regular. If it did, the party taking the land might in fact compel a sale of the land, or compel the party to buy the school-house or any other building erected upon it. See §§ 29, 32, 33, 34, of c. 101.

Judgment for the demandant.

JOSEPH F. PEABODY vs. JAMES BROWN, JR.

A deed to "Hiram Gowing, cordwainer," may be shown by parol evidence of the previous negotiations between the parties to have been intended for "Hiram G. Gowing," who was a person of middle age, and not for "Hiram Gowing," his son, who was but thirteen years old.

WRIT OF ENTRY to recover land in Danvers. Plea, nul disseisin. At the trial before the chief justice, both parties claimed title under a warranty deed made on the 5th of May 1841, by Henry F. Newhall, in consideration of \$115, to "Hiram Gowing, of said Danvers, cordwainer."

The demandant contended that this deed conveyed the premises to Hiram Gowing, then a minor about thirteen years of age, who died in 1852, leaving his father, Hiram G. Gowing, his heir, who afterwards conveyed to the demandant.

The tenant claimed title under levies of executions against Hiram G. Gowing upon the estate in 1842 and 1843; and called Newhall as a witness, who, on inspection of the deed, testified that he executed it, that he now knew Hiram G. Gowing, but did not then know that he had any G. in his name; and he was about proceeding to testify, that the negotiation was with the father, who paid him the consideration, and that he supposed he was giving the deed to him; when the competency of this evidence and all parol evidence was objected to, as tending to show that, when there was a grantee named, Hiram Gowing, capable of taking the estate by conveyance, another grantee not bearing that name was intended, and in consequence of being so intended to take, the estate under that deed vested in him.

The demandant, objecting to all parol evidence of intention to control the operation of the deed, stated that if the tenant was allowed to go into such evidence, he should oppose it by evidence tending to show that the father was in fact acting for the son, and that the intent was to make a purchase for him, and that it was made with funds given to the son by some relative.

Peabody v. Brown.

The case was reserved for the whole court upon this agreement: "If the court are of opinion that it is not competent to go into the proposed evidence to show that, although the deed was executed as it was, and there was a person of that name, capable of taking by the deed, and no other person bearing the same name appearing, still it was intended for the father, bearing the same name with the addition of a middle initial letter, and under the circumstances would vest the estate in him, so that it could be levied upon on an execution against him, and taken to satisfy his debts, then judgment to be entered for the demandant. But if the court are of opinion that such evidence is admissible, and if the facts to be established by such proof would show that the deed vested the estate in the father, then the case to be submitted to a jury, to find upon the evidence, offered on both sides, whether such was the intent of the parties to the deed of Newhall to Gowing."

O. P. Lord, for the demandant, cited *Stackpole v. Arnold*, 11 Mass. 27.

I. Brown, for the tenant, cited 4 Cruise Dig. tit. 32, c. 21, §§ 10 & seq.; *Game v. Stiles*, 14 Pet. 322, and 1 McLean, 321; *Scanlan v. Wright*, 13 Pick. 523; *Doe v. Roe*, Geo. Decis. pt. I. 80.

SHAW, C. J. Where two names are distinguishable, such as George and James, or even where the names are much alike, as Edward and Edwin, both popularly called Ned, still being well known distinct Christian names, it is not competent to go into direct parol evidence that where Edward was written Edwin was intended. *Crawford v. Spencer*, 8 Cush. 418.

But where, taking the name and addition together, the deed fully applies to neither, it falls within the rule of a latent ambiguity.

Here it is "Hiram Gowing, cordwainer," and it is shown that the boy Hiram Gowing was only thirteen years old, not at the ordinary age even to commence an apprenticeship; it is in effect a latent ambiguity, and therefore opens the case for parol evidence.

New trial ordered.

HARLEY NEWCOMB vs. WILLIAM NOBLE.

In replevin of property claimed under a mortgage, the deposition of the subscribing witness to the contents of the mortgage, and to his having seen the property described therein, is admissible to identify the property, although neither the mortgage nor any copy thereof is annexed to the depositions.

REFLEVIN of a horse. Answer, property in the defendant. The plaintiff claimed title under a mortgage from Ignatius J. Hollis; and at the trial in the court of common pleas, in order to prove that the property replevied was the same described in the mortgage from Hollis, offered the deposition of his own son, in which he testified that, at the time of which this mortgage bore date, he read, and knew the contents of, and signed as witness a mortgage from Hollis of a horse which he described, and that the horse was at the time at his father's house. Neither the mortgage nor any copy thereof was annexed to the deposition. To the admission of this testimony the defendant objected, because it was either entirely immaterial, or stated the contents of a written instrument. But *Mellen*, C. J. overruled the objection, a verdict was returned for the plaintiff, and the defendant alleged exceptions.

E. W. Kimball, for the defendant.

The plaintiff submitted the case without argument.

BY THE COURT. The evidence was competent to show that the horse in controversy in this action was the same as that included in the mortgage. This was the sole purpose for which it was offered and admitted. The contents of the mortgage were, we suppose, proved either by its production or by other competent evidence.

Exceptions overruled.

JOHN A. PUTNAM vs. JOHN TUTTLE.

A deed of land, *habendum* "with all the privileges and appurtenances to the same belonging excepting all the wood and trees on a certain island I reserve to the grantee his heirs and assigns forever," and concluding "it is to be understood that the wood above mentioned is reserved to the grantor and his heirs forever," reserves to the grantor an estate of inheritance in the wood and trees only then growing, with a right in the soil for their growth and nourishment, and the privilege of entering to take them away.

ACTION OF TORT for forcibly entering and cutting trees growing on the island mentioned in a deed made in 1751 by Charles Tuttle, Jr. (under whom the defendant claimed), to Nicholas Woodbury (whose title the plaintiff had) with this *habendum* : "To have and to hold the said granted and bargained premises with all the appurtenances and privileges to the same belonging excepting all the wood and trees on a certain island in above-said meadow I reserve to the said Nicholas Woodbury his heirs and assigns forever to his and their only proper use benefit and behoof forever;" and with this clause at the end of the deed, just before the signature : "It is to be understood that the wood above mentioned is reserved to Charles Tuttle Junior and his heirs forever." Most of the trees cut were not in existence in 1751. Upon the case above stated, the parties submitted the right of action and the rule of damages to the judgment of the court.

S. B. Ives, Jr., for the plaintiff.

D. E. Safford, for the defendant.

THOMAS, J. The question is what estate in the trees and the land on which they grew was reserved in the deed made by Charles Tuttle to Nicholas Woodbury in 1751. We think the reservation is of all the trees standing and growing upon the land when the deed was made, and of the use of the land for their growth and nourishment, and for cutting down and removing them.

The direct reservation is of the wood and trees on a certain island. This is clear and definite, and refers only to the wood and trees then standing and growing. The latter clause, which operates as a *habendum*, makes no new grant, but shows the

Prescott, Receiver, v. Pulsifer & another.

tenure of that before made, that the wood and trees and the interest in the soil necessary for their growth are reserved to the grantor, not for his life, but in fee to him and his heirs forever — as if he had said, “I am to have the wood and trees now on the island in the meadow, but the right to take them is not personal to myself or limited to my life, but is also for my heirs.”

A reservation of the right to the wood and trees forever growing on the land would be in effect a right in the soil itself for the growth and nourishment of trees so long and so far as it was used for that purpose.

The case at bar is distinguishable from that of *Clap v. Draper*, 4 Mass. 266, in which the grant was to Humfrey, his heirs and assigns, of “all the trees and timber standing and growing on said land forever, with free liberty for them to cut and carry away said trees and timber at all times at their pleasure forever.” The court put particular stress upon the word “forever” as applied to “the trees and timber standing and growing on the close” — growing on the close forever, instead of those merely standing at the time.

What was reserved by the deed in this case was the wood then on the island, but without limit as to the time when it should be removed. The defendant therefore is liable for all trees cut, not standing and growing on the island in 1751.

Case referred to an assessor to ascertain the value.

WILLIAM C. PRESCOTT, Receiver, vs. WILLIAM PULSIFER & another.

A debtor assigned to his creditor a mortgage of \$500 as collateral security for the payment of his debt of \$1400; he was afterward sued on the debt, and judgment rendered against him for the whole debt, and execution issued thereon and put into the hands of an officer, with instructions to collect \$600, or obtain good security therefor; and the officer released the debtor upon receiving a promissory note for \$600, which he indorsed to the creditor, who afterwards collected from the mortgagor the amount of the mortgage. *Held*, that

VOL. X.

5

Prescott, Receiver, v. Pulsifer & another.

in a suit upon the note the defendant, in order to show that the money received on the mortgage discharged the whole debt, might give in evidence an agreement in writing made by the parties, pending the former suit, by which, upon the payment by the debtor of \$575 (which he had not since paid), the mortgage should be reassigned to him, otherwise judgment to be entered for that sum.

ACTION OF CONTRACT by the receiver of the Bowditch Mutual Fire Insurance Company upon a promissory note for \$600, dated June 11th 1855, signed by the defendants, payable to Francis O. Irish, and by him indorsed to the plaintiff.

At the trial in this court at May term 1856 before *Merrick, J.*, the plaintiff produced the note declared on, and rested his case.

The defendants, in opening, proposed to prove the following facts: The defendant William Pulsifer in 1850 was an agent of said company, and assigned to them, as collateral security for any sums then or thereafter due from him to the company, a promissory note of one Dannels for \$500, secured by mortgage of real estate. The company afterwards sued said Pulsifer on an indebtedment of \$1400, and pending that suit the parties executed the agreement copied in the margin.* Said Pulsifer paid \$100, but no more, pursuant to that agreement. The suit was continued to November term 1854, when Pulsifer was defaulted, and judgment entered for the sum of \$14,000, with interest and costs; and an execution issued thereon, which was placed by the

* Essex, ss.

Supreme Judicial Court.

WILLIAM PULSIFER v. BOWDITCH M. F. INS. CO.

It is agreed by the parties the said Pulsifer shall pay the said company the sum of one hundred dollars in ten days from date, and the further sum of five hundred and seventy five dollars in six months from date; and the said company is to deliver and reassign to said Pulsifer a certain mortgage made by one Dannels to said Pulsifer and assigned by him to said company as collateral security, together with the note secured by said mortgage; said security to be given up on payment of the above sums; and if said sums are not paid as above, then judgment to be entered in the above sums, together with interest from and after they become due as aforesaid; and that the action shall be continued till the November term of this court, in pursuance of this agreement.

Salem, March 8, 1844.

Bowditch M. F. Ins. Co.
by Wm. C. Prescott, Receiver.
Wm. Pulsifer.

plaintiff in the hands of Irish, a deputy sheriff, with directions to collect \$600 of Pulsifer or obtain good security therefor. Irish arrested Pulsifer, and discharged him from arrest on receiving the note now sued upon. The company afterwards commenced an action to foreclose the mortgage against Dunnels, who thereupon in July 1855 paid the amount of the mortgage note with interest and costs.

Said agreement was then offered in evidence by the defendants, but excluded by the presiding judge. A verdict was returned for the plaintiff, and the defendants alleged exceptions, which were argued and decided at November term 1856.

S. H. Phillips & W. G. Choate, for the defendants.

O. P. Lord & W. C. Endicott, for the plaintiff. The note declared on was given in part satisfaction of a judgment against one of the defendants, which, until reversed, is conclusive on the parties thereto, and a good consideration for this note, and cannot be contradicted by evidence of any agreement made respecting the action in which it was rendered. No evidence was offered tending to show that the note declared on had been paid, or that there was any collateral security for it.

BIGELOW, J. The facts, which the defendants offered to prove, that the officer was instructed to collect on the execution \$600 or obtain good security therefor, and that, pursuant to such directions, he did obtain the note for that amount, being the note now in suit, and thereupon discharged the party from arrest, were evidence tending to show that the company had agreed to take \$600 in full satisfaction of the execution. And the agreement of the parties, made before the judgment was rendered, to settle the whole claim for about the same sum, was admissible for the same purpose, and as bearing on the question whether there was an agreement between the parties that the payment of the sum due on the mortgage pledged to said company as collateral security should be applied, when collected, to the payment in full of the note in suit.

Exceptions sustained.

At a second trial before *Metcalf, J.*, after the plaintiff had introduced the note and rested his case, the defendants, in

Lathrop v. Grosvenor.

opening, made the same offer of proof as at the first trial, and proposed to contend that the note in suit was paid by the money received by the plaintiff from Dunnels.

Irish, being called as a witness for the defendants, testified that the plaintiff put into his hand the execution against William Pulsifer, and stated to him that the company had security from Pulsifer, but that it fell \$600 short of the amount due on the execution, and that Irish must collect \$600 or obtain good security for it, or arrest said Pulsifer; that he told said Pulsifer what the plaintiff had directed him to do, and said Pulsifer thereupon gave the note in suit; but that he did not arrest said Pulsifer.

The defendants then offered in evidence the said agreement, "for the purpose of showing the amount that was due from said Pulsifer to the plaintiff, as agreed on by the parties;" and requested the judge to rule, that "if the note was taken in satisfaction of the judgment, and if the debt for which the Dunnels mortgage was given was the same as that for which the judgment was obtained, then the money received by the plaintiff upon the mortgage would discharge the note, either in whole or in part, as the case might be." But the judge refused to admit said agreement in evidence, "not deeming it competent to show that the former judgment was wrong and erroneous." The verdict was for the plaintiff, and the defendants alleged exceptions, which, after argument by *J. A. Gillis*, for the defendants, and *Lord & Endicott*, for the plaintiff, were now, upon the authority of the previous decision, *Sustained.*

GEORGE W. LATHROP *vs* JOHN M. GROSVENOR.

In an action on the covenant against incumbrances, the burden of proof is on the plaintiff to show that any incumbrance was lawful.

ACTION OF CONTRACT ON the usual covenant against incumbrances in a deed of land from the defendant to the plaintiff

The case was referred by rule of court to arbitrators, who awarded in favor of the plaintiff, subject to the opinion of the court on these facts: "The Boston and Maine Railroad, some eight years since, in the construction of their railroad across the Spicket River, laid the abutments of a bridge in such a manner as to obstruct the natural flow of the water of the river, (not navigable,) at certain times of the year, thereby causing the plaintiff's land to be flowed, for which the damages are claimed."

N. W. Harmon, for the plaintiff.

E. P. G. Marsh, for the defendant.

BIGELOW, J.* The plaintiff, on the facts stated in the report of the referees, is not entitled to the sum assessed for damages caused by the erection of a bridge by the Boston and Maine Railroad over the Spicket River. The burden of proof was on the plaintiff to show a breach of the covenant against incumbrances. To show such breach by the erection of the bridge, which caused water to flow back on his land, it was necessary for him to establish a legal right in the Boston and Maine Railroad to obstruct the stream. The defendant did not covenant against the unlawful and tortious acts or trespasses of third persons, but only against such rights or easements in the premises conveyed as constituted legal incumbrances thereon. It does not appear by the report of the referees, that any evidence was offered by the plaintiff as to the mode in which the bridge was built, or whether it was lawfully erected over the river by the railroad corporation. If it was built in a reasonable and proper manner, within the due exercise of the power conferred on the corporation by their franchise, and for the purpose of constructing their road in a convenient and suitable manner, then it was a lawful erection, and the right to flow back water on the land conveyed to the plaintiff by the defendant would be a lawful incumbrance, for which an action of covenant would lie. But if the bridge was built in a mode not required for the due,

* This case was decided, and the subsequent cases were argued, at Boston in January 1858; present all the judges but THOMAS, J.

Tyler & another v. Currier & others.

reasonable and proper construction of the road, or the obstruction of the stream was a wanton and careless act on the part of the railroad corporation, not necessary to the due exercise of its franchise, then there was no breach of covenant. In such case, the acts of the railroad were tortious and unlawful, and the plaintiff's remedy therefor was by an action of tort against the railroad corporation. *Mellen v. Western Railroad*, 4 Gray, 301. *Perry v. Worcester*, 6 Gray, 544.



GORDON K. TYLER & another vs. WILLIAM CURRIER & others.

Under *St.* 1855, c. 231, giving a lien upon ships for labor or materials, to be enforced by petition to the court of common pleas "in the manner provided by" the Rev. Sts. c. 117, §§ 4 & *seq.*, a petition cannot be filed until the debt sought to be secured has remained unpaid sixty days after it has been payable, as provided by the Rev. Sts. c. 117, § 4, in case of liens on buildings.

PETITION, inserted in a writ and filed in the court of common pleas on the 20th of May 1856, to enforce a lien upon two vessels under *St.* 1855, c. 231, for timber sold and delivered by the petitioners to the respondents on the 14th of April 1856. The respondents contended that the petition was prematurely brought, because the sum for which the lien was claimed had not been due and unpaid for sixty days; and relied on the provision of *St.* 1855, c. 231, § 3, that "such lien may be enforced by petition to the court of common pleas, in the manner provided by the fourth and subsequent sections of the one hundred and seventeenth chapter of the revised statutes," and the provision of the Rev. Sts. c. 117, § 4, that "when any sum due by such contract shall remain unpaid for the space of sixty days after the same is payable, the creditor may, upon a petition to the court of common pleas," obtain a decree. But *Briggs*, J. overruled the objection, and entered a decree for the petitioners. The respondents alleged exceptions.

Tyler & another v. Carrier & others.

C. T. Russell, for the respondents.

O. P. Lord & W. C. Endicott, for the petitioners. The provision of the Rev. Sts. c. 117, § 4, that the creditor shall not bring his petition until sixty days after the sum due is payable, is no part of "the manner of enforcing the petition;" but merely specifies the time requisite to complete the lien, as indicated by the provision of § 1, that he "shall have a lien in the manner hereinafter provided." The Rev. Sts. c. 117 thus give a lien after the sixty days only; the St. of 1855, c. 231, § 1, gives a lien immediately. To extend this postponement of proceedings against immovable property, to a ship afloat and which may go away at any moment, would often defeat the lien. And see St. 1855, c. 231, § 2. Even in the case of buildings and land, this postponement of remedy has now been abolished. Sts. 1851, c. 343; 1852, c. 307.

METCALF, J. The court are of opinion that this petition was prematurely brought, and, for that reason, if for no other, cannot be granted. The St. of 1855, c. 231, on which this petition is founded, provides, by § 3, that the lien therein given on ships and vessels "may be enforced by petition to the court of common pleas, in the manner provided by the fourth and subsequent sections of the one hundred and seventeenth chapter of the revised statutes." The Rev. Sts. c. 117 provide for the lien of mechanics on the land upon which buildings are erected, in the erecting or repairing of which they have, by contract, furnished labor or materials; and by § 4, "when any sum due by such contract shall remain unpaid for the space of sixty days after the same is payable, the creditor may, upon petition to the court of common pleas for the county where the land lies, obtain a decree for the sale thereof, and for applying the proceeds to the discharge of his demand." The subsequent sections relate to the filing of the petition, its contents, the notice to be ordered by the court, proof of claims, trial of questions of fact, order for sale, &c. And these petitioners do not deny that they are required, by St. 1855, c. 231, § 3, to conform their proceedings, in the present case, to the provisions of the sections subsequent to § 4 in c. 117 of the revised statutes. But they take the

 Tyler & another v. Currier & others.

position, that the provision in the revised statutes, that the creditor shall not bring his petition until sixty days after the sum due is payable, is no part of the "manner of enforcing the petition." We think otherwise. There is no limitation, unless it be that of sixty days; and it is not to be supposed that the legislature intended to authorize the enforcement forthwith of a lien on ships and vessels. If they had intended that such lien might be enforced sooner than a mechanic's lien might, we doubt not they would have so expressly provided. If the restriction as to time is not adopted, suits may be commenced in one day after the debts become due, and vessels be arrested, and large costs incurred. The restriction gives time for adjustment, notice and arrangements, and tends to prevent the hasty, vexatious or unreasonable use of the remedy.

By *St.* 1845, *c.* 163, § 8, "the same remedies" were given to persons whose property should be damaged by the Essex Company, by flowing, &c., as were provided by the *Rev. Sts. c.* 39, for persons damaged by railroad corporations; and by § 58 of that chapter, an application to the county commissioners for an estimate of damages for property taken by such corporations was required to be made within three years from the time of the taking thereof. It was held, in *Call v. County Commissioners*, 2 Gray, 232, that an application for an estimate of damages done by the Essex Company, by flowing land, must be made within three years of the erection of the company's dam, although it was contended that the provision for "the same remedies," as were given against railroad corporations, related to the form only of the remedy, and did not attach the limitation of three years. That case is analogous to this.

*Exceptions sustained.**

* A libel in admiralty to enforce the lien given by *St.* 1855, *c.* 231, may be filed at once. *The Richard Busteed*, Sprague, 449 § seq.

JOSEPH B. F. OSGOOD & another vs. HENRY B. FERNALD,
Judge of Insolvency.

Jurisdiction in proceedings in insolvency, pending before a commissioner when the *St.* of 1856, c. 284, took effect, vested upon his subsequent death in the judge of insolvency, and not in the judge of probate.

SHAW, C. J. It appears by the petition of Joseph B. F. Osgood and Jairus W. Perry, that insolvent proceedings were commenced before John G. King, Esq., late commissioner of insolvency for the county of Essex, on the 1st of July 1856, by the issue of a warrant, on the application of Joseph Shotswell; that afterwards, in due course of said proceedings, Shotswell was adjudged an insolvent debtor; that Osgood was duly appointed clerk by said commissioner, and Perry having been duly chosen assignee, the estate and property of Shotswell were duly assigned to him by the commissioner. These proceedings were continued in a due course of administration until July 1857, at which time the said commissioner, John G. King, died.

On recurring to the statute establishing courts of insolvency, we find that the act passed on the 6th of June 1856, and took effect thirty days after, on the 6th of July 1856. *St.* 1856, c. 284. By § 40 of that act it is provided that the act shall not affect any case in insolvency, which shall have been commenced before the act shall take effect. These proceedings having been rightly commenced before Commissioner King six days before this act went into operation, by force of the statute he continued to have the entire jurisdiction of the proceedings until his decease.

But it now appears, that at the decease of Mr. King the estate of Shotswell remained unsettled, no dividend of the assets in the hands of the assignee had been made, and a question arose whether the authority of taking jurisdiction of the unfinished proceedings of an insolvent estate was vested by law in

the judge of probate of the county, or in the judge of the court of insolvency.

The petitioners further show that they made a written application to the Hon. Henry B. Fernald, judge of the court of insolvency, requiring him to take jurisdiction of the said proceedings in insolvency, and to hold the meetings theretofore ordered by said commissioner in his lifetime, but the said Fernald declined and refused to take jurisdiction of said proceedings and to hold said meetings, for the reason, as he said, that the statutes gave him no authority in such cases. And the petitioners pray for a mandamus to the said Fernald, then and now judge of the court of insolvency for this county, requiring him to take jurisdiction of the said insolvent proceedings, and do all proper acts necessary to the due and orderly settlement of said estate.

The question arises, upon the construction of the statutes, In whom the law vests the prosecution of unfinished insolvent proceedings, when the commissioner, before whom they were commenced and are rightly proceeding, has deceased after the act establishing a court of insolvency came into operation? So many changes have been made in the provisions of the insolvent laws during the twenty years they have been in force, and the jurisdiction so often changed, having at different times been vested in judges of probate, masters in chancery, and now in a regularly constituted court of insolvency, it is not surprising that some doubt should be reasonably entertained on this subject. But it is obviously of great importance that all doubt, practically affecting so many interests, should be removed; and we have therefore paid the earliest attention to the question.

It is certain that whilst the general jurisdiction was vested in commissioners, and up to the time of the establishment of the court of insolvency, the law was, that if a commissioner should die, the jurisdiction of all unfinished insolvent proceedings pending before him should be transferred to the judge of probate. The question is, whether this course of legal proceedings was altered by the *St.* of 1856, *c.* 284, and the establishment of a court of insolvency. This act provides, in § 2, that the judges

of insolvency "shall have and exercise all the jurisdiction, power and authority that commissioners of insolvency now have and exercise" under the insolvent laws, that is, of originating all proceedings; "and all the provisions in said acts contained shall apply in like manner to said judges respectively as they apply to judges of probate, masters in chancery and commissioners of insolvency, except so far as said provisions or any of them may be by this act modified or repealed."

Now one of the functions of the judges of probate, at the time of passing the act, was to take and exercise jurisdiction over all unfinished proceedings pending before commissioners of insolvency at the time of their decease; and we think that those anterior provisions, which vested such jurisdiction in judges of probate, were by force of this clause declared to apply to judges of insolvency, and vested the same jurisdiction in them, on the decease of a commissioner, which had before been vested in judges of probate. And nothing in other parts of the act seems to us to alter or modify this construction.

We now recur again to § 40, which provides that "this act shall not affect any case in insolvency now commenced, or that shall hereafter be commenced before this act shall take effect; and the judge of probate, master in chancery or commissioner, before whom any such cases may be pending at the time this act shall take effect, shall have the same jurisdiction, power and authority in respect to them as they now have."

A doubt, perhaps the principal doubt, has been suggested on the first clause of this section, "shall not affect any case pending before a commissioner when this act takes effect." It is plausibly said, if the proceeding is not to be affected, the consequence is, that if the commissioner dies, the proceedings will be transferred to the judge of probate, because such was the law before. But the two parts must be construed together. The latter clause of the statute, after stating that this act shall not affect, &c. is, that the judge of probate, master in chancery or commissioner before whom, &c. shall have the same jurisdiction, &c. Now there are two cases in which the judge of probate might at that time have had jurisdiction; first, cases

pending from the time when judges of probate had original jurisdiction ; and secondly, cases in which commissioners had before that time died, and their unfinished cases had then been already transferred to the judges of probate.

Taking the whole section together therefore, our opinion is, that it was the intention of the law to continue the jurisdiction of judges of probate, where it had vested already in either of these cases, and also to the masters in chancery and commissioners of insolvency, in cases where they had already then acquired jurisdiction, and to enable them to complete the cases they had thus begun, and the purpose of the whole section was to accomplish this object ; and it was not intended to confer jurisdiction in any case in which it had not then attached.

Then the next section, § 41, repeals "so much of the several acts to which this is in addition, as gives jurisdiction to judges of probate, masters in chancery and commissioners of insolvency," and all other inconsistent provisions.

We think this repeal does divest the jurisdiction given to judges of probate over unfinished proceedings, on the decease of commissioners, as well as the original jurisdiction of commissioners of insolvency.

Then if we are right in the construction of the second section, that all other jurisdiction, not actually vested in a judge of probate, shall hereafter vest in a judge of insolvency, which, though not so clearly expressed in terms as it might be, seems to us to be a fair construction of the provision, it brings the different parts of the act into harmony with each other, and best carries out the intent of the legislature.

Besides, it is plainly more consistent with the policy of the law, on establishing a regularly constituted court of insolvency, with its seal, its recording officer, and permanent judge, to hold that all jurisdiction in insolvency proceedings, not actually vested in other officers, should be transferred to that court ; and it would be inconsistent with that policy to go back and establish so anomalous a proceeding as to vest a special jurisdiction in the probate court in an exceptional case without any apparent object to be obtained. See *Dearborn v. Ames*, 8 Gray, 1.

Brown v. Stone.

The court are all of opinion that a proper mandate go to the judge of the court of insolvency for the county of Essex, requiring him to take and exercise jurisdiction in the case in question.

W. C. Endicott, for the petitioners.

INCREASE H. BROWN *vs.* THOMAS STONE.

In a controversy between proprietors of adjacent estates as to the width of a passage way between them, the descriptions in deeds of the estates to one under whom both proprietors claim title are admissible in evidence.

The owner of a right of way over a passage way may, for the purpose of keeping the way fit for use, disturb the soil and pave or repair it, making no material change in its condition, nor interfering with the estates of others in the way.

ACTION OF TORT for forcibly entering the plaintiff's close in Marblehead, digging up the soil and carrying away the pavement. Answer, that the acts complained of were done lawfully, under the authority of Joseph G. Wooldredge, upon land between the dwelling-houses of the plaintiff and Wooldredge, over which both had a common right of way.

At the trial in the court of common pleas, before *Perkins, J.*, both parties claimed title, through several mesne conveyances, under John Nutt's will, made in 1775, when he owned both estates. The deed under which plaintiff claimed, and several of the preceding conveyances since the devise of Nutt, bounded the plaintiff westerly on the estate of Wooldredge; and the deed of Wooldredge, and several of the preceding conveyances since Nutt's devise, bounded his estate easterly on the passage way between the premises and the plaintiff's estate. The plaintiff contended that this passage way included the whole open space between the two houses. The defendant contended that it was a much narrower way, of about three or four feet, by the side of the plaintiff's house.

As evidence of the width of the passage way, the defendant

VOL. X. 6

was permitted, against the plaintiff's objection, to put in deeds of Wooldredge's estate from Daniel Felton and wife to Daniel Felton Jr., and from Daniel Felton Jr. to Nutt, and an intermediate deed from Felton and wife to Nutt of the plaintiff's estate, the measurements in which would give a passage way of the width contended for by the plaintiff.

There was evidence, introduced without objection, tending to show that the tenants in the house of Wooldredge had constantly made use of the whole of this space between the two houses for a long period of time, and also that the tenants in the plaintiff's house not only had not used, but some of them had disclaimed any right to use the said open space or yard.

The court directed the jury "that the plaintiff would hold, as he claimed, by the description in the deeds of conveyance from John Nutt through several intermediate conveyances to himself; but as the plaintiff's estate was bounded westerly on the estate of Wooldredge, and Wooldredge's estate was bounded easterly on a passage way between his premises and the estate of plaintiff, and as no width or other description of said passage way or the uses to which it was to be put was given, the jury would judge from all the evidence before them whether the passage way was only so much as claimed by the defendant, or a larger width, or the whole distance between the houses, as claimed by the plaintiff; that the mere fact that there was an open space of eight feet between the houses did not necessarily show that the passage way referred to in the deeds was eight feet wide; the jury would look to the whole evidence, and say whether the passage way referred to was the whole space between the houses, or a less width, or the width claimed by the defendant; that if the jury were satisfied from the evidence that there was a passage way actually laid out there by Daniel Felton, marked and distinguishable on the ground, of the width claimed by the defendant, and that remained an open and well known passage way, used as such, and was the passage way referred to in the deeds from Nutt to Wooldredge, then the plaintiff's estate would extend no farther than to the westerly side of said passage, and Wooldredge's estate would go only

to the westerly side of said passage way ; the whole estate having been vested in Nutt by the deeds from Felton, that would clear the estate from all tenancies in common and all rights of way and passages as such ; and those deeds were evidence only on the extent and limits of said passage way, if the jury were satisfied that one was laid out and established and remained open and known as such in fact upon the premises, while the whole estate was in the hands of Nutt, and occupied by his tenants and after his conveyances to his grantees."

The court stated "that if, as the defendant claimed, Wooldredge and the plaintiff were tenants and owners in common of the whole land between the two houses, this action for trespass thereon could not be sustained against Wooldredge, nor against the defendant acting by his authority; but as the case stood this point did not arise, as it was evident there was no tenancy in common ; that at all events there was a passage way somewhere between the houses, upon which it was admitted that the said Wooldredge had a right of way and no more ; and that the plaintiff was the owner in fee of the land over which that way passed, whatever might be its width."

The plaintiff's evidence tended to show that the defendant entered upon said passage way, and dug up the soil thereof, and took and carried away the paving stones therefrom and converted the same to his own use. The defendant's evidence tended to show that he took nothing from the passage way, but left it in as good or better condition than he found it.

The plaintiff requested the court to instruct the jury "that if the defendant entered upon said passage way and dug up the soil, and took and carried away the quantity of paving stones, as alleged, as matter of law such acts would not be a legal use of such passage way." But the court ruled "that the defendant, standing as it was agreed in the place of Wooldredge, and having thus a right to use the way over said passage, might on behalf of Wooldredge make every fair and reasonable use of it as such way ; he might use the surface for passing and repassing, and he might enter upon it for the purpose of preparing, repairing and keeping the way in order for such use as Wool

dredge was entitled to; and for that purpose and to that extent he might disturb the soil or surface, dig up the paving and repave the way to the extent necessary and suitable for repairing and keeping the same in order; that the jury would ascertain what if any of the acts complained of the defendant had done if the acts done by the defendant had not exceeded Wooldredge's right to the use of this as a way for the purpose of passing and repassing and keeping it in order as above, defendant would not be liable; but if he had exceeded such use, he would be liable for the damage done."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions, which were argued at the last term.

J. H. Robinson, for the plaintiff.

A. A. Abbott, for the defendant.

MERRICK, J. The plaintiff's land is bounded, on its westerly side, by the land of Joseph C. Wooldredge; and the land belonging to the latter is bounded on its easterly side by a passage way situate between the dwelling-houses on their respective estates. They disagree in relation to the extent and width of this way; and this disagreement constituted the subject of inquiry, and was the chief point in controversy upon the trial of this action. The question respecting which the parties were thus at issue was a mere question of fact; its determination depended wholly upon the effect to be allowed to the evidence in the case, and the inferences justly to be drawn from it, and not at all upon any contested construction of the contents of the several deeds which they had respectively produced, concerning which no difference of opinion appears to have been entertained or expressed. It was a matter therefore strictly within the province of the jury, and was of course very properly left to their decision.

The defendant contended that the way by which the estate of Wooldredge was bounded was located in the same place, and was of the same width and extent, as the passage way mentioned in the deed from Daniel Felton to John Nutt, under whom both the parties to this suit derive their titles. For the purpose of proving the locality, and the space which the last

mentioned way occupied, he was allowed to introduce the deeds of Felton to Nutt and to Felton Jr. This was correct; for the existence, extent and width of that way constituted a part of the facts essential to the maintenance of the defence relied upon. And in reference to those deeds, and to all the evidence having any bearing upon the particular question upon which the parties were at issue, the jury were rightly instructed that if a passage way, marked and distinguishable on the ground, was in fact actually laid out there by Daniel Felton, and if that was the same passage way which is referred to in the several deeds from Nutt and his assigns to Wooldredge, the plaintiff's estate would not extend beyond its westerly side, but would be defined and limited by it. Under such instructions, it is obvious that whatever tended to establish the precise locality and exact extent of the way laid out by Felton must have been admissible as competent and pertinent evidence.

The law in relation to the rights of tenants in common was accurately stated by the presiding judge. But as no such tenancy was shown to have at any time existed in which the parties had any interest, although the law upon that subject seems to have been somewhat considered and discussed, the principles laid down by the court had no bearing upon the final decision of the case, and of this the jury were fully and satisfactorily advised. Whatever was said upon that subject therefore affords the plaintiff no just cause of complaint.

As the right of way belonged to Wooldredge, it was lawful for him to do any work upon its surface, which was necessary, fit and proper to be done there to enable him to use and enjoy his right in it in a manner beneficial and advantageous to himself, provided he did not thereby make any material change in the state and condition of the soil, or disturb or interfere with the estate or privileges of other persons therein. For this purpose and within this limitation, his acts in the preparation, repair or improvement of the way were justifiable, and could not be treated or resisted as a trespass by an owner of the land who held it in fee subject to such an easement. *Appleton v. Fullerton*, 1 Gray, 186. This is the right of Wooldredge; and if the

Smith v. Porter.

defendant, acting under his license and authority, did in no particular exceed it, he was not liable to the plaintiff for any damage alleged to have been done by him. The instructions given to the jury upon this subject were to this effect, and were consequently unobjectionable. *Exceptions overruled*

ALBERT W. SMITH vs. SAMUEL PORTER.

A grant of "liberty to pass and repass over my land where it is necessary," confers a right of way to and from those lands only which the grantee owns at the date of the deed; and the burden of proof is on him and those claiming under him, if sued as trespassers, to show what those lands were.

The date of a deed is *prima facie* evidence of the time of its execution.

ACTION OF TORT for breaking and entering the plaintiff's close. Answer, a right of way over the close. Trial and verdict for the plaintiff in the court of common pleas before *Mellen*, C. J., to whose rulings the defendant alleged exceptions, the substance of which appears in the opinion.

D. Roberts, for the defendant.

J. A. Gillis, for the plaintiff.

MERRICK, J. It appears from the statements in the bill of exceptions, and by reference to the plan used at the argument, which, it is agreed, designates, with sufficient accuracy for the purpose of the present inquiry, the location and boundaries of the adjoining estates belonging to the parties, that the defendant is the owner of two lots or parcels of land, separated from each other by intervening lands belonging partly to Giddings and partly to the plaintiff. One of these lots is bounded upon a public highway; to the other the defendant has no means of access, except by passing from the one in front across the adjoining land of some other proprietor. For this purpose he claims that he has a right of way over the plaintiff's land by virtue of an express grant made to Matthew Whipple, under whom he claims, by John Whipple, from whom through several

intermediate conveyances the plaintiff derives his title to the estate upon which the alleged trespass was committed.

By his deed dated the 3d of April 1798, John Whipple, being the owner of the land now owned by the plaintiff, granted "to Matthew Whipple, his heirs and assigns forever, liberty to pass and repass over my land where it is necessary." By this conveyance Matthew Whipple acquired a perpetual right of way to and from all the lands of which he was seised and possessed at the date of that deed. It is not pretended, nor could that position have been maintained, if it had been assumed, that this servitude extended to, or could have been availed of by the grantee in connection with, any other lands to which he might subsequently have acquired a title. *Stearns v. Mullen*, 4 Gray, 151. And accordingly it became material to ascertain and determine, upon the trial of the present action, whether Matthew Whipple was at the time of that grant an owner of the whole, or of any part of the two lots now belonging to the defendant. The rear lot of the latter evidently consists of land which once constituted two separate parcels, but left lying in common with each other, one of which contained about eighteen acres and the other one and a half acres. Of each of these last named parcels Matthew Whipple was certainly at one time or another the owner; for by his deed dated April 5th 1797 he conveyed the eighteen acre lot to Nathan Poland, who subsequently conveyed it to Dudley Porter, the defendant's father, and by his deed dated March 23d 1808 he conveyed the acre and a half lot to Dudley Porter. But still the question remained whether he owned or had any interest in either of the parcels, when he took the aforementioned grant from his brother John on the 3d of April 1798. The court instructed the jury that upon the issue to be determined by them, the burden of proof was upon the defendant to show affirmatively that Matthew was at that time the owner of one or both of these parcels; and that in the absence of any proof as to the time of the actual delivery of the deed from Matthew Whipple to Poland it would be the presumption of law that it was delivered at its date, and that the title to the estate thus passed from the grantor to the grantee.

The jury having upon the issue submitted to them and upon this question found a verdict for the plaintiff, these instructions were excepted to by the defendant. But they were correct in both particulars. The defendant set up and asserted that he had a right of way over the plaintiff's land. This was in avoidance of the action. If true, it constituted a complete justification of the acts complained of, and was a perfect defence. But to avail himself of it, it was indispensable, according to the well settled rule of law, that he should first establish the truth of his allegations by satisfactory proof; and this, in the particular aspect of the case when the instructions objected to were given, he could only do by showing that Matthew Whipple was the owner of the land referred to on the 3d of April 1798. The burden of proof was therefore necessarily upon him to establish that essential fact. Whatever opinions may have prevailed heretofore, the law is now well settled, that the burden of proof, when it once devolves upon a party, never afterwards, in relation to the same question, shifts, in the progress of the trial, over upon his adversary. *Commonwealth v. McKie*, 1 Gray, 61. *Burnham v. Allen*, 1 Gray, 496. *Crowninshield v. Crowninshield*, 2 Gray, 524. *Alden v. Pearson*, 3 Gray, 342. *Phelps v. Cutler*, 4 Gray, 137. *Commonwealth v. Daley*, 4 Gray, 209.

All deeds and contracts ought regularly to be dated on the day of their execution. This is important for a great variety of purposes. The rights of the contracting parties are not unfrequently made to depend upon an accurate statement of time. Accordingly it is found by experience that in the prudent management of affairs this rule is commonly recognized as useful and observed with care. And this being at once the usual and proper manner of conducting a transaction of this kind, it may well be considered reasonable and safe to conclude, in any particular instance, where there is no other evidence upon the subject, that any legal instrument by which property is conveyed was completed on the day on which it bears date. The principle, *omnia presumuntur rite acta*, is not confined merely to official proceedings, or the doings of public bodies, but has been extended to acts of private individuals, especially when they

Smith v. Porter.

are of a formal character, as writings under seal. 1 Phil. Ev. (8th ed.) 470. The instruction of the court respecting the effect to be given to the deed of Matthew Whipple to Nathan Poland was in conformity to this rule, and adapted to the state of the evidence upon which it was called for. It is of little importance that the deed was not acknowledged on the same day on which it purports to have been executed, but on the 17th of January 1806. It is well known that in this commonwealth the title to land, followed by a corresponding seisin and possession, often passes by instruments of conveyance which are not duly acknowledged; and accordingly the law will not allow a title to fail on account of such omission, but has made suitable provision for supplying the defect of an acknowledgment, where it is found to exist. Rev. Sts. c. 59, § 14.

It is wholly unnecessary to consider whether the instructions given by the court, or asked for by the counsel for the defendant, respecting a right of way by necessity, were correct; because there was no evidence in the case, which could possibly give occasion for their application. It does not appear that the plaintiff, or any person under or from whom he derives his title to the land over which the right of way is claimed, ever owned, conveyed or had any interest in the whole or any part of the estate of the defendant. As against the plaintiff, therefore, there was no pretence for asserting that the right contended for could be acquired by operation of law as a way of necessity.

Exceptions overruled.

GEORGE W. COOK vs. SAMUEL FARRINGTON.

A conveyed to B a lot of land bounded "south on a passage way twenty feet wide," "also such rights on the beach lying directly between the passage way and the sea, as were conveyed to the grantor by F, by a deed which passed the beach as appurtenant. B conveyed to C this lot, describing it as "bounded southeasterly on a passage way," and as "entitled to the privilege, mentioned in a deed from F to A, to which reference for further particulars may be had." *Held*, that the beach passed under both deeds.

ACTION OF TORT for breaking and entering a close in Lynn, consisting of a beach between high and low water mark and within one hundred rods of the upland. The entry was admitted, and the parties submitted the case to the decision of the court upon the following facts :

The defendant's title was as follows : On the 12th of April 1847 Joseph Fuller and Daniel Fuller conveyed to Nathan D. Chase and George Foster a tract of land, bounded southeasterly on the sea, "with the privilege of a passage way twenty feet wide over land of said grantors eastward to the beach," which adjoined and was appurtenant to the land granted. On the 17th of April 1847 Chase and Foster conveyed to William Collins part of this land, designated as "lot No. 8," adjoining the beach in question, and bounded "north on lot No. 7 eighty feet; east on land of Nathaniel Fuller, eighty feet; south on a passage way, twenty feet wide, forever to be kept open, eighty feet; with the privilege of crossing Nathaniel Fuller's land on said passage way, as was deeded to us by Joseph and Daniel Fuller April 13th 1847, recorded" with Essex deeds; "also such rights on the beach lying directly between the eighty feet passage way above mentioned and the sea, as were deeded to us by said Joseph and Daniel Fuller." On the 1st of September 1848 Collins conveyed by a like description to James Harding, who on the 14th of November 1855 conveyed to Samuel A. Stone, (whose title the defendant had,) lots 7 and 8, describing them as bounded "southeasterly on a passage way eighty feet, and southwesterly on" King Street, and as "subject to the rights and reservations, and entitled to the privileges, mentioned in a

deed from Joseph and Daniel Fuller to N. D. Chase and George Foster, recorded" as aforesaid, "and a deed of lot No. 8 from William Collins to said Harding, recorded" in like manner, "to which several deeds reference for further particulars may be had."

The plaintiff claimed title under a deed from Chase and Foster to him, dated June 13th 1853, conveying a certain piece of beach, bounded "southwest on King Street, running southeast to the sea; thence southeast on the sea, running northeast eighty feet, to beach formerly owned by Daniel and Joseph Fuller; thence northeast by said beach, running northwest, to a passage way twenty feet wide lying between said beach and land sold by us to William Collins; thence northwest on said passage way, running southwest eighty feet to point first started from on King Street;" "said beach being subject, however, to the travel from King Street and Lewis Street over it, and all the privileges and rights heretofore deeded away."

The deed of Chase and Foster to Collins was not recorded until after this suit was brought, but it is the same one referred to in the deed from them to the plaintiff.

L. Brown, for the plaintiff.

J. A. Gillis, for the defendant.

BY THE COURT. The deed of Chase and Foster to Collins embraced the whole beach under the second description — "also such rights on the beach lying directly between the eighty feet passage way above mentioned and the sea as were deeded to us by said Joseph and Daniel Fuller." This came by various mesne conveyances to the defendant. Chase and Foster's deed to Collins was not recorded until after the deed to the plaintiff, but that deed was made subject to "all the privileges and rights heretofore deeded away." Thus the plaintiff took subject to the unrecorded deed. The defendant has the better title.

Judgment for the defendant.

ALEXANDER MCGREGOR vs. WILLIAM WAIT & others.

Admissions, made by a wife without her husband's knowledge, are not competent evidence of a way by prescription over land owned by them in her right.

Admissions of a son, residing with his parents and managing their estate, are not competent evidence against them of a right of way over it, without proof of the extent of his agency.

The silence of a tenant for life, when remarks are made in his presence in disparagement of his title, is no evidence against his remainderman.

A deed, under which a party to a suit claims title, being admitted by him on cross-examination to be in his possession, may be ordered to be produced and put in evidence, without calling the attesting witness.

ACTION OF TORT for breaking and entering the plaintiff's close in Ipswich, tearing down a wall and treading down the grass. Answer, a right of way over the premises from land adjoining.

At the trial in the court of common pleas, before *Bishop, J.*, it appeared in evidence that the close described, with a dwelling-house thereon, was conveyed by Aaron Goodhue to Mary Hobbs, wife of Abraham Hobbs, in her own right, in 1816; and was occupied by her and her husband until 1847, when they conveyed it to the plaintiff; and that the defendants inherited from their mother, Betsey Wait, the land adjoining, with a dwelling-house thereon.

The defendants offered to introduce evidence that about 1817 or 1818 Mrs. Hobbs, while living with her husband upon the premises, came to Mrs. Wait, after the death of her husband, and asked leave to move a small shop upon a part of the space over which the defendants claimed a right of way; that Mrs. Wait gave her permission to do so, stating at the same time that, as there would be room enough left for teams to pass, she had no objection; and that the building was put there, and had remained there ever since. But there was no offer to show that Mr. Hobbs had any notice of such request.

The defendants also offered to prove that a son of Mr. and Mrs. Hobbs, while the principal agent of the estate, upon which his father and mother then lived, asked permission of Mrs. Wait, after the death of her husband, to put some fag-

ots upon the place over which the defendants claimed a right of way; and received permission from her to do so, upon the understanding that the fagots should remain there for a short time only. The judge excluded all the above evidence.

Evidence was introduced by the defendants, that the passage through which they claimed a right of way had been known as the "gangway;" and Hannah Wait, one of the defendants, was permitted to testify that about forty years ago Abraham Hobbs placed a fence across this way, and Aaron Goodhue and some old men, neighbors of the parties, came, at the request of Mrs. Wait's husband, with him, to the place where said fence was erected; and "Goodhue asked Hobbs what he was up to; Hobbs replied that he was 'fencing up his well'; Goodhue then said, 'Mr. Hobbs, I have given you a privilege to the well and the gangway, to use the gangway peaceably with the other family,' and turned to the neighbors who were present, and asked them if they ever knew a fence to be placed where this one was erected; to which they replied in the negative; that stakes were then placed for a certain distance along the side of what the defendants claimed to be their way; that Hobbs was present during the whole interview, and made no reply to what was said, and no other remark than the one above stated, and that two or three days afterwards the fence was taken away."

The judge excluded this evidence of conversations; but permitted the evidence to go to the jury that stakes were driven down in a certain place described by the witness, and that a fence was built, and shortly afterwards taken down.

William Wait, one of the defendants, being examined as a witness in their behalf, and asked upon cross-examination whether he had in his possession any deed through which he claimed title, answered that it was in the possession of his counsel. The court then ordered the counsel to give the deed to this witness, and allowed it to be read in evidence, notwithstanding an objection that it must first be proved by the subscribing witness.

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. A. Gillis, for the defendants. 1. Evidence of the request made by Mrs. Hobbs to Mrs. Wait should have been admitted, as the admission of a grantor of the plaintiff. A right by prescription proceeding on the presumption of a grant, it was not necessary to presume a grant from Hobbs and wife; it might have been made by their grantor; and although Mrs. Hobbs could not make a grant without her husband, she could admit the existence of a prior grant. *Gayetty v. Bethune*, 14 Mass. 49.

2. The request made by George Hobbs was admissible as a declaration of his parents, he being their agent in the management of the estate.

3. The statements of Goodhue were admissible, having been made upon the land in the presence of Hobbs, and in disparagement of Hobbs's title. *West Cambridge v. Lexington*, 2 Pick 536. *Doe v. Petlett*, 5 B. & Ald. 223. *Hyde v. County of Middlesex*, 2 Gray, 267. Hobbs's silence, when remarks were made in his presence which called for a reply, may be used as an admission. *Commonwealth v. Call*, 21 Pick. 515. *Boston & Worcester Railroad v. Dana*, 1 Gray, 83. *Commonwealth v. Harvey*, 1 Gray, 487.

4. The order to the defendants' counsel to produce the deed, without due notice previously given, was erroneous.

O. P. Lord & S. B. Ives, Jr., for the plaintiff.

METCALF, J. 1. We are of opinion that the judge rightly declined to admit evidence that Mrs. Hobbs, without her husband's knowledge, applied to Mrs. Wait for leave to put a shop on a part of the ground over which the defendants claim a right of way. That evidence was offered for the purpose of proving a right of way over land owned in fee by Mrs. Hobbs, and of which her husband and herself were seised and possessed in her right. If it was admissible for this purpose, it must have been on the ground of her confessing or admitting that her land was subject to a servitude. Such a confession or admission, by her alone, would not bind either her, or her husband, or her heirs, or the plaintiff, who is the grantee of her husband and herself. It is certain that she could not have made a valid grant of a right of way. Being under coverture, she was not competent to make

a grant which would estop either herself or her heirs. And "to say that one may, by acts in the country, by admission, by concealment or silence, in effect do what could not be done by deed. would be practically to dispense with all the limitations the law has imposed upon the capacity of infants or married women to alienate their estates." *Lowell v. Daniels*, 2 Gray, 169.

2. Evidence of George Hobbs's application to Mrs. Wait, for leave to place fagots on the land over which a right of way is now claimed, had no legal tendency to prove such right, and was properly excluded. The nature and extent of his agency (if any) for his parents are not shown, and therefore his implied admission of a right of way cannot affect them or their grantee.

3. The statements made to Abraham Hobbs, by Goodhue and "the neighbors," are not to be taken as true, or as admitted by Hobbs, by reason of his silence. Besides; if Hobbs were held to have admitted Wait's right of way, that admission would be evidence against himself only. He was merely tenant for life, (his own life or that of his wife,) and could not affect the rights of other parties by any admission, or even by a grant, of a right of way over land so held by him. *Gale & Whatley on Easements*, Pt. I c. 5, § 2. 3 Stark. Ev. (4th Amer. ed.) 1217, 1218. *Peake Ev.* (5th ed.) 318.

4. We are of opinion that William Wait was rightly required to produce the deed under which he made claim, and that it was rightly allowed to be read in evidence without calling the attesting witness. See *Jackson v. Allen*, 3 Stark. R. 74; *Pearce v. Hooper*, 3 Taunt. 60; *Doe v. Hemming*, 9 D. & R. 15; *Jackson v. Kingsley*, 17 Johns. 158.

Exceptions overruled.

Warren v. Cogswell & wife.

GARDNER WARREN vs. FRANCIS COGSWELL & wife.

A deed of "a certain parcel of land, situated in A., being my homestead, containing two hundred acres, being the same estate now occupied by me," does not pass four lots in the occupation of tenants at will, although included in two hundred acres in A., owned by the grantor; and cannot be contradicted by extrinsic evidence of an intent of the parties to include those lots.

WRIT OF ENTRY to recover two hundred acres of land in Andover. Plea, as to four lots included in the tract sued for, nul disseisin; and a disclaimer as to the residue. Trial before *Metcalf, J.*, who reported to the full court the following case:

The demandant claimed title under two mortgages to secure the payment of \$20,000, made by John Marland to James L. Little and others in December 1847, and since foreclosed, of "a certain parcel of land, situated in said Andover, being the homestead of me the said John Marland, in that part of said Andover called Ballard Vale, containing two hundred acres of land, being the same estate now occupied by me." The tenant claimed title under a second mortgage, made by Marland in March 1848, which described by metes and bounds the four lots specified in the plea. At the time of making the demandant's mortgages, these four lots, with the houses and shops thereon, were owned by Marland, and occupied by tenants at will, paying rent to him; and were separated by walls and fences from the residue of the land demanded, which was used and occupied by Marland as a farm, and had his mansion house upon it. Marland owned about two hundred acres of land at Ballard Vale.

The demandant offered in evidence certain policies of insurance upon buildings on these lots, effected by Marland and assigned by him to said Little and others; and also offered to prove that the property owned by Marland at Ballard Vale was not worth more than twenty thousand dollars. But the judge ruled that this evidence was incompetent.

J. W. Emery, (*O. P. Lord* with him,) for the demandant.

1. The deed of John Marland to Little and others passed all the estate owned by Marland at Ballard Vale, at its date. All the

land then owned by him was but two hundred acres. The word "homestead" in this country has no settled legal meaning, and must be so construed, in connection with all the words used in the description of the thing granted, as to give effect to the intent of the grantor. *Taylor v. Mixer*, 11 Pick. 346. *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15. *Wheeler v. Randall*, 6 Met. 529. *Dana v. Middlesex Bank*, 10 Met. 250. *Aldrich v. Gaskill*, 10 Cush. 155. The construction is to be against the grantor. *Worthington v. Hylyer*, 4 Mass. 205. *White v. Gay*, 9 N. H. 126. *Cocheco Manufacturing Co. v. Whittier*, 10 N. H. 305. *Jackson v. Blodget*, 16 Johns. 172. The word "estate" may mean the quantity of the grantor's interest in lands. *Godfrey v. Humphrey*, 18 Pick. 539. *Tracy v. Kilborn*, 3 Cush. 557. The use of the words "homestead estate," and not "farm," shows that more than his farm was intended to be conveyed. The addition of the words "being the same estate occupied by me," if repugnant, cannot alter, limit or control the preceding description. *Cutler v. Tufts*, 3 Pick. 272. *Cartwright v. Amatt*, 2 Bos. & Pul. 43. *Melvin v. Proprietors of Locks & Canals*, 5 Met. 28. *Eliot v. Thacher*, 2 Met. 44, note. *Wheeler v. Randall*, 6 Met. 529. *Sawyer v. Kendall*, 10 Cush. 241. *Hibbard v. Hurlburt*, 10 Verm. 173. In *Brown v. Saltonstall*, 3 Met. 425, the words were not "estate occupied," but "house and land occupied;" and were used in a devise, which must be construed, if possible, so as not to disinherit the heir. *Denn v. Gas-kin*, Cowp. 661.

2. If upon the case stated a doubt is raised as to the meaning of the description, evidence of the contemporaneous acts of the parties, and of the value of the whole property, is admissible to remove the doubt. *Stone v. Clark*, 1 Met. 381. *Codman v. Winslow*, 10 Mass. 149. *Broom's Max.* (2d ed.) 473. *Derby v. Hall*, 2 Gray, 243. *Morgan v. Moore*, 3 Gray, 322.

J. W. Perry, for the tenants. 1. The four lots in question did not pass under the description "homestead," which means "chief seat," "mansion house," "place of the house," or "house place." "Homestead farm" has a broader signification, but does not necessarily include all the parcels of land owned by

the grantor, though lying and occupied together. 1 Bouvier's Law Dict. Homestead. *Woodman v. Lane*, 7 N. H. 245. *Taylor v. Mixter*, 11 Pick. 347. *Aldrich v. Gaskill*, 10 Cush. 158. Words of quantity are controlled by the other certain words of description. *Bacon v. Leonard*, 4 Pick. 277. *Aldrich v. Gaskill*, 10 Cush. 155. *Woodman v. Lane*, 7 N. H. 241, & cases cited. *Allen v. Allen*, 14 Maine, 387. *Jackson v. Barringer*, 15 Johns. 471. The words "now occupied by me" define and limit the former words; and "occupied" has received a judicial construction that excludes these four lots from this description. *Brown v. Saltonstall*, 3 Met. 425. *Doe v. Parkin*, 5 Taunt. 321. *Marshall v. Pierce*, 12 N. H. 128. *Allen v. Allen*, 14 Maine, 387.

2. The evidence offered by the demandant was incompetent. It had no tendency to explain the meaning of the words "homestead" and "occupied." *Brown v. Saltonstall*, 3 Met. 425, & cases cited. *Tucker v. Seaman's Aid Society*, 7 Met. 209. *Norton v. Webster*, 12 Ad. & El. 442.

BY THE COURT. 1. The four lots not in the grantor's occupation were not embraced in the term "homestead," and did not pass by the mortgages to Little and others. *Brown v. Saltonstall*, 3 Met. 413.

2. The evidence offered and excluded was inadmissible to affect the construction of the deed. *Judgment for the tenants.*

JOHN C. PHILLIPS vs. FREDERIC TUDOR.

THOMAS W. PHILLIPS vs. SAME.

A deed by a tenant in common of "sixty four rods, being part of" the lot held in common, passes no title in common; nor in severalty, without possession taken under it of the part claimed.

ACTIONS OF TORT for breaking and entering the closes of the plaintiffs in Nahant and removing a wall.

The actions were tried together in the court of common pleas, when it appeared by the plaintiffs' evidence that they occupied two adjoining lots of land, with dwelling-houses thereon, westerly of the road leading over Bass Neck, upon both of which lots was an old wall, a short distance from the road and nearly parallel to it; and that in May 1855 the plaintiffs moved this wall out upon the line of the road, and in October 1855 the defendant moved the wall back to its original position.

The plaintiffs claimed that the land between the old wall and the road, upon which the alleged trespasses were committed, was part of the lot laid out to Moses Hudson in the division of common lands at Nahant by commissioners in 1706, the deeds of which they held.

The defendant claimed that this land was part of the lot laid out to Robert Potter, by the same division, next eastwardly of the lot laid out to Moses Hudson, and that the old wall was the boundary between the lots of Hudson and Potter.

The defendant also claimed an interest in the Robert Potter lot, as tenant in common, and a right to remove the wall from the Robert Potter lot, where it was placed by the plaintiffs, back to the boundary between the Hudson and Potter lots.

The Potter lot was in the common pasture, and had never been inclosed; and all the lands at Nahant, not inclosed, have always been used as a common pasture by the owners of the lots laid out in 1706; each owner having a right in the general pasture in proportion to the land he held uninclosed. Before May 1855 the common pasture extended over the land between the old wall and the road, which is a town way running through the common pasture.

The plaintiffs showed no interest in the Potter lot, and there was no evidence of any division or partition of that lot.

The defendant put in evidence a deed of quitclaim, dated March 14th 1839, from John Stone and others to Samuel Tufts, of "a certain undivided fifth part of a lot of land, said lot in the whole containing about two and a half acres, our part of the same being about one half of an acre, undivided; said lot is situate on Nahant, being a part of the third lot in the fourth

range;" also a deed, dated March 26th 1847, from Tufts to the defendant of "sixty four rods; being part of the third lot in same range, laid out to Robert Potter."

The Potter lot contained nearly two acres, and it was admitted by the defendant upon examination of the title, that the interest of Tufts in that lot was but thirty one and three fifths rods, and that the land between the old wall and the road contained more than that.

The plaintiffs objected that by the deed of Tufts to the defendant the defendant took an interest in severalty in the Potter lot, and not in common, and had no right to enter upon any part of the Potter lot, except upon what he held in severalty; and as there was no evidence of his holding in severalty any part of the land between the road and the old wall, that he had no right to remove the wall, even if the plaintiffs had no title. And *Mellen*, C. J. ruled, that under the deed of Tufts the defendant could not justify entering and removing the wall; and ordered verdicts for the plaintiffs, which were returned, and the defendant alleged exceptions.

W. C. Endicott, for the defendant. Where a grantor, seised of a certain parcel of land, conveys a moiety or part of the same, without words of limitation or assignment in severalty, the grantee takes as tenant in common. Lit. § 299. Co. Lit. 190 b. *Webster v. Atkinson*, 4 N. H. 24. *Adams v. Frothingham*, 3 Mass. 362. The words "sixty four rods" merely explain the amount of the "part" conveyed, but do not indicate any assignment or limitation in severalty. It can make no difference whether a deed states the number of rods of land in the part, or states the fractional part.

Upon the same principle, if the grantor, instead of being seised of the whole parcel, is a tenant in common in the whole, and conveys a part or moiety, being his whole interest, without words of limitation or assignment in severalty, then the grantee takes as tenant in common. Under the deed from Stone and others, Tufts was seised as tenant in common of thirty one and three fifths rods (that being found upon examination of title to be all that they held) in the Potter lot. It is not to be pre-

sumed, in the absence of express words, that Tufts intended to convey an estate in severalty in any particular portion of the lot, for he did not own the whole; nor that he intended to create another estate in common, in a particular portion, within the general estate in common, unless he clearly so describes it, by naming the boundaries, or in some way designating its position, it having been in common pasture and undivided.

Where a grantor conveys a certain number of acres in a large tract, to be selected by the grantee, the grantee takes as tenant in common. Co. Lit. 48 b. 4 Cruise Dig. tit. 32, c. 21, § 44. *Jackson v. Livingston*, 7 Wend. 136.

It is conceded that a deed by a tenant in common of a specific portion of the lands held in common is void as to the other cotenants, the unity of possession being destroyed. *Porter v. Hill*, 9 Mass. 34. *Bartlet v. Harlow*, 12 Mass. 348. *Peabody v. Minot*, 24 Pick. 329. *Mitchell v. Hazen*, 4 Conn. 495. *Hinman v. Leavenworth*, 2 Conn. 244 note. But in all those cases the land was conveyed by metes and bounds; and such a deed has never been decided to be a conveyance in severalty without metes and bounds, or something equivalent. The word "undivided" is not necessary to create a tenancy in common; and the fact that no particular estate in severalty is described shows that the estate is conveyed in common and not in severalty.

Words in a deed operate according to the intention of the parties, if by law they may; and if they cannot operate in one form, they shall operate in that which by law will effectuate the intention. Bac. Ab. Grant, I, 1. *Osman v. Sheafe*, 3 Lev. 372. *Goodtitle v. Bailey*, Cowp. 600. By holding this deed to create a tenancy in common the rights of the cotenants are not impaired, the intent of the parties is carried out, and nobody is affected, except one taking the land without title.

G. W. Phillips & O. P. Lord, for the plaintiffs, cited *Webster v. Atkinson*, 4 N. H. 21; *Canning v. Pinkham*, 1 N. H. 353; *Great Falls Co. v. Worster*, 15 N. H. 423, 454; *Adams v. Frothingham*, 3 Mass. 353; *Bean v. Thompson*, 19 N. H. 290; *Haven v. Cram*, 1 N. H. 93; *Longworth v. Bank of United States*, Wright, 51; *Walsh v. Ringer*, 2 Ohio, 327; *Turney v. Yeoman*,

16 Ohio, 24; *Ronkendorff v. Taylor*, 4 Pet. 362; *Cameron v. Irwin*, 5 Hill, 275; *Enfield v. Permit*, 5 N. H. 280; *Parkhurst v. Smith*, Willes, 332.

BIGELOW, J. The deed of Samuel Tufts, under which the defendant claimed title and justified the act of trespass alleged in the declaration, cannot be construed to convey an estate in common and undivided with the other owners of the Robert Potter lot. There is nothing to indicate that the grantor intended to convey an undivided interest in the whole lot. On the contrary, it does not purport to convey the whole interest of the grantor, nor an undivided interest in the entire tract. It is only a grant of sixty four rods, parcel of a larger lot. He owned a certain portion or fraction of the whole lot. This he does not grant, but he conveys sixty four rods, and describes it as part of a lot, in the whole of which he was the owner of an undivided interest. The deed does not come within that class of cases where the owner of an entire tract conveys a certain part of the whole. In such cases there is no difficulty in construing the conveyance as a grant of an undivided interest in the proportion which the quantity granted bears to the whole parcel.

What was then the effect of the deed? A conveyance in severalty of sixty four rods in a close containing a larger quantity and owned in common with others, without boundaries or other means to designate or fix the location of the land intended to be granted, if valid as against all persons except other owners in common of the whole close, cannot take effect until the grantee has entered and taken possession of the quantity of land conveyed by the deed, and thus made certain the part of the close which he claims to hold in severalty under his grant. Until such entry and possession, it is wholly uncertain what part of the close is comprehended within the grant, and the deed cannot take effect as to any specific part. There was no proof of any such entry in the present case upon the land where the trespass was committed. The defendant had no title to enter as a tenant in common, and he proved no entry upon any portion of the land to hold in severalty. *Exceptions overruled.*

WILLIAM WILLIAMS vs. ABIGAIL NICHOLS.

A promissory note, given by a widow to a creditor of her deceased husband for the amount of his debt, is void for want of consideration, if the husband has left no estate or assets, though the creditor gives the widow at the same time a receipted bill acknowledging payment from her husband's estate by the note.

ACTION OF CONTRACT upon a promissory note, made by the defendant, a widow, on the 5th of September 1854, to the plaintiff, for the amount of his bill for attendance as a physician at the last illness of William Nichols, the defendant's husband, who died July 17th 1853. At the time of receiving this note the plaintiff gave the defendant a receipted bill acknowledging payment from the estate of his demand, by this note.

After proof of the above facts at the trial in the court of common pleas, the defendant offered to show that "William Nichols left no estate or assets, out of which this debt could have been paid, or the defendant remunerated for incurring this liability." But *Mellen*, C. J. rejected such evidence as immaterial, and ruled that the facts disclosed sufficient consideration for the note in suit; and under the instructions of the court the jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

T. M. Stimpson, for the defendant, cited *Packard v. Richardson*, 17 Mass. 139; *Hill v. Buckminster*, 5 Pick. 391; *Parish v. Stone*, 14 Pick. 198; Chit. Con. (8th Amer. ed.) 29; *Dearborn v. Bowman*, 3 Met. 155, & cases cited; *Jones v. Ashburnham*, 4 East, 463.

O. P. Lord, for the plaintiff. A consideration, in order to support a promise, need not necessarily be beneficial to the promisor. It is sufficient if any privilege or advantage goes from the other party, or he suffers any damage, trouble or prejudice, or the promise is the inducement to the transaction. *Forster v. Fuller*, 6 Mass. 68. *Amherst Academy v. Cows*, 6 Pick. 427.

The defendant, rather than take out administration upon her husband's estate, voluntarily chose to pay the debt against the estate by her own note. The giving up of a receipted bill for

his services by the plaintiff was a sufficient consideration to support the note. It was immaterial whether or not the estate was insolvent. She, having considered his receipted bill, which was in the nature of an assignment of the debt to her, worth her promissory note, is now estopped to prove that it was of no value. Indeed, the giving up by the plaintiff of the right of administration (to which he was entitled by the delay of the widow for more than a year to take out administration) was of itself a sufficient consideration.

DEWEY, J. This case presents the naked question of a legal consideration for the note sought to be recovered. The facts offered to be shown by the evidence were that the husband, who was the original debtor, had died, leaving no estate real or personal liable to the payment of his debts, or the subject of distribution among his heirs, or which might be applied by way of an allowance to his widow in any form. The case stated is that of one dying without leaving anything to pass to anybody for any purpose, or in any form whatsoever. Whether this fact can be shown may be a subject of inquiry hereafter; but, as regards the legal question now before us, we must take the case to have been that of a widow who, at the solicitation of a creditor of her deceased husband, gives to him a promissory note promising to pay him the amount of his debt due from her husband, in a case where there are no assets to be administered, and where no possible benefit can result to the party giving such note, and no possible damage is suffered by the payee.

In the case supposed, the widow would derive no benefit from the discharge of a debt due by her deceased husband. Nor do we perceive how any possible damage to such creditor could arise from having given a receipt to the widow purporting to discharge such demand. The giving of the receipt would not, under the circumstances here offered to be shown, establish a legal consideration for the note. In the opinion of the court, upon the facts offered, if shown to exist, the case would be that of a voluntary promise, not founded on any legal consideration.

Exceptions sustained.

**JOHN GUSTIN vs. INHABITANTS OF SCHOOL DISTRICT NUMBER
FIVE IN DANVERS.**

Any subdivision of one school district which has been altered within ten years is within the prohibition of *St.* 1849, c. 206, that "no town shall be districted anew for school purposes, so as to change the taxation of lands of proprietors into districts using different school-houses, oftener than once in ten years."

ACTION OF CONTRACT to recover back money assessed on the plaintiff for the building of a school-house and paid by him under protest. The case was submitted to the judgment of the court upon these facts:

At a meeting on the 7th of April 1856, the town of Danvers voted to alter the lines of several of the school districts, and among them of District No. 5, which lost seven scholars by the alteration. At a meeting on the 23d of June 1856, the town voted to divide District No. 5 into two districts, one to be called No. 5 and the other No. 8, which last contained no part of what had been added to District No. 5 by the vote of April 7th. The inhabitants of District No. 5 afterwards voted to build a new school-house, and, in order to raise money for that purpose, assessed the tax in question on the inhabitants of so much of the district as had not been set off as District No. 8.

O. P. Lord, for the plaintiff.

S. B. Ives, Jr. & J. B. Peabody, for the defendants. The *St.* of 1849, c. 206, only provides that "no town shall be districted anew for school purposes, so as to change the taxation of lands of proprietors into districts using different school-houses, oftener than once in ten years." It prohibits a redistricting of the whole town; not the subdivision of one district. It applies only to such a districting anew "as to change the taxation of proprietors into districts using different school-houses;" not to this case, in which it is agreed that the second vote did not affect any land which had been affected by the first.

DEWEY, J. The decision of the present case depends upon the construction to be given to the *St.* of 1849, c. 206. That a

change of the territorial limits of School District No. 5 in Danvers, and one that somewhat affected the rate of taxation of lands in the district, was made by the town by their vote of June 23d 1856, is conceded in the facts stated by the parties. The present tax was voted and assessed in reference to the school district as constituted by that vote. Was this change in District No. 5 in violation of the statute above cited?

The defendants insist that this statute only forbids the redistricting of the whole town, and not a change in a portion of the school districts. We cannot adopt that construction, but suppose it to be intended to protect the inhabitants of a town from too frequent or double taxation for building school-houses, and other expenses incident to a change in the territorial limits of school districts. The evil apparently intended to be remedied by the statute might equally arise from a change in a portion of the districts as from a change made in all.

The language of this statute is somewhat obscure, and objection might be taken to the use of the words, "so as to change the taxation of the lands of *proprietors*," as the most appropriate words to express the real estate of the inhabitants of the district. But the same form of expression is adopted in the additional statute of 1851, c. 303, which has strongly confirmed us in the opinion that the first named act was intended to restrain towns from changing the territorial limits of school districts, in such manner as to affect taxation of real estate, oftener than once in ten years. The additional act gave a full opportunity to each town once to make any changes in the districts within ten years after the passage of the first act, and was enacted to secure that object. This seems to assume as the construction of the original act a restriction of the alterations to the period of ten years, and provide that no change in the districts before the act of 1849 shall debar the town from redistricting once after the passage of that act.

The town of Danvers had made changes in their school districts, and redistricted the town by their vote of April 7th 1856. This under these statutes had exhausted their powers; and the vote of June 23d 1856, making further changes in the district

Cram v. Bailey & another.

was unauthorized, and a tax voted and assessed upon School District No. 5, as constituted by this latter vote, was an illegal assessment, and the plaintiff is entitled to recover the money he has paid in discharge of the tax assessed and collected of him.

Judgment for the plaintiff.

SUSAN C. CRAM vs. JAMES W. BAILEY & another.

The owner of property, by joining in a mortgage of it from another person, does not estop himself to assert his title as against any one but the mortgagee; and, in an action of trespass against an officer attaching it as the property of that person, may recover the full value of the property, notwithstanding a settlement made between the attaching creditor and the mortgagee without the mortgagor's assent.

ACTION OF TORT against a deputy sheriff and his assistant, for taking and carrying away personal property. The defendants denied that it was the property of the plaintiff, and justified under a writ of attachment against Maria A. Cram.

At the trial in the court of common pleas before *Briggs, J.*, it appeared that by a mortgage, dated December 6th 1854, made by said Maria, and signed also by the plaintiff, and duly recorded, this and other property were conveyed to Ebenezer B. Chase, to secure the payment, in sixty days from date, of fifty dollars due him from said Maria, the plaintiff's daughter, with whom she lived, and in whose house the property was; and that Chase, when he received the mortgage, and the defendants, when they took this property, knew that it was the plaintiff's.

The defendants requested the judge to instruct the jury that the mortgage of this property by the daughter, assented to in writing by the plaintiff, and recorded, rendered the property liable to attachment as the daughter's, and estopped the mother to maintain this action. But the judge refused.

The defendants also contended that the plaintiff could at most recover only the value of the right of redeeming the property from the mortgage; and that the jury, in assessing dam-

ages, should deduct the amount of the mortgage debt. But the judge ruled that the plaintiff was entitled to recover if anything the full value of the property.

The defendants, in mitigation of damages, also offered in evidence an agreement signed by Chase, by which, in consideration of having received from the defendant Bailey \$25, the proceeds of a part of the property mortgaged and attached as aforesaid, he released said defendant and the attaching creditors from all claim for damages on account of that part of the property. But the judge rejected the evidence as incompetent and immaterial.

The jury found for the plaintiff, and the defendants excepted.

R. Cross, for the defendants.

D. Saunders, Jr., for the plaintiff.

BY THE COURT. 1. The plaintiff's right in her property was not divested or changed, as against strangers, by reason of her having mortgaged it for her daughter's debt. As against all persons but the mortgagee and those claiming under him, she had the right of property and of possession, and can maintain this action.

2. The measure of damages to the plaintiff was the value of the property at the time when it was taken. The fact that a third person had a claim upon it did not diminish the plaintiff's claim for damages. *Ullman v. Barnard*, 7 Gray, 558.

3. The settlement made by the attaching creditors with the mortgagee, without the plaintiff's knowledge or consent, did not affect the plaintiff's claim for damages. It did not appear but that the daughter would pay the whole of her debt.

Exceptions overruled.

JOSEPH P. HARDY vs. DANIEL POTTER.

The Rev. Sts. c. 28, § 154, requiring lumber to be surveyed before sale, do not apply to a sale in another state of lumber in this commonwealth.

Testimony of a purchaser of lumber that he bought and paid for it in another state, the lumber being then in the custody of an agent of the seller in this state, to whom the seller promised to write; that nothing more was to be done between the seller and himself in relation to the sale; and that he afterwards saw it here; is sufficient evidence of a delivery to be submitted to the jury.

ACTION OF TORT for the conversion of lumber. Answer, that the defendant took it on mesne process against John Adams in January 1856; and that any previous sale of it by Adams to the plaintiff was void, because fraudulent, and because the lumber had not been previously surveyed as required by law.

At the trial in the court of common pleas before *Mellen*, C. J., the plaintiff testified that he bought the lumber from Adams at Frankfort, Maine, in October 1855, and took two bills of sale of it, and paid for it by his promissory notes; that the lumber was then lying on certain wharves in Beverly in this county, in the custody of John H. Cross, an agent of Adams, and to whom Adams promised to write; that nothing more was to be done between himself and Adams in relation to the sale; that the lumber was bought by the marks of the survey made in Maine, and was not surveyed in Massachusetts before its attachment by the defendant; and that in the fall of 1855 he saw it in Beverly. The plaintiff offered no further evidence of delivery, but rested his case.

The defendant asked the presiding judge to rule, "that the plaintiff could not maintain his action, because,

"1st. It did not appear by the evidence introduced by the plaintiff that there was any such delivery as would perfect the sale from Adams to the plaintiff.

"2d. It appeared from the evidence that the sale, if any there was, was in violation of the provisions of the Rev. Sts. c. 28, § 154, and was therefore void."

The presiding judge refused so to rule; but ruled, and subse-

Hardy v. Potter.

quently instructed the jury, "that if nothing more remained to be done between the parties, and if the plaintiff prior to the attachment had been to Beverly, to the place where the lumber was, and had exercised acts of ownership over it by virtue of his purchase, and treated it as his property, that would constitute a delivery of it;" and "that if the contract was executed and the possession of the property had passed to the plaintiff, and he was holding under that purchase when it was attached by the defendant, it was not a matter that would avoid the contract that there had been no survey of the lumber in this state before such attachment, or before the delivery of the lumber to the plaintiff." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. A. Gillis, for the defendant.

O. P. Lord, for the plaintiff.

MERRICK, J. The plaintiff claims the lumber under two bills of sale thereof from John Adams. The contract of sale was made and completed in the State of Maine, where the vendor and vendee then both were; but the lumber thus sold was then lying on a wharf in Beverly in this state. It does not appear, and it has not been suggested, that the contract of sale was in contravention of, or invalid under, the laws of the State of Maine. It cannot be affected by the provisions of the statute of this commonwealth, Rev. Sts. c. 28, § 154, which has no extraterritorial operation. And being legal and valid by the laws of the state where the contract was made, the bills of sale made for a good and valuable consideration transferred the property to the plaintiff from Adams, and the sale was thereupon effectual against him, and against all other persons, except subsequent *bona fide* purchasers and attaching creditors, who should obtain possession thereof before there was any delivery to or possession taken by the plaintiff of the same.

Whether there was any such delivery or possession taken by the plaintiff of the lumber before it was attached by the defendant was submitted to the jury upon proper and correct instructions; and their verdict is decisive upon that question.

Exceptions overruled.

EZRA B. WELCH & others vs. WASHINGTON MERRILL.

In an action for the price of goods delivered to a third person on the alleged credit of the defendant, the plaintiff cannot give in evidence his previous direction to his servant to refuse a further credit to that person.

ACTION OF CONTRACT for the price of meat delivered to Michael Comody on the credit of the defendant.

At the trial in the court of common pleas, before *Bishop, J.*, Amos Bailey testified that while in the employ of the plaintiffs in 1853 he sold meat to Comody a few times, and was then directed by the plaintiffs not to trust him; that on the 4th of July the defendant asked him to let Comody have meat and that he would see that it was paid for; that he subsequently furnished meat to Comody on the expectation that the defendant would pay for it; that Comody never paid him anything after said 4th of July, and that he had never called on Comody for pay.

Daniel Morse, one of the plaintiffs, testified that Comody had meat till the 4th of July; that he made out Comody's bill till the 1st of July and sent it over by Bailey. The plaintiffs then asked what directions the witness gave Bailey. To this the defendant objected. But the objection was overruled; and the witness answered that he directed Bailey not to let Comody have any more meat if he did not pay that bill. The witness then further testified that subsequently he had an interview with the defendant, who requested him to let Comody have meat and he would see the witness paid; that he let Comody have the meat, expecting the defendant to pay for it; and that he did not call on Comody to pay for any meat furnished after the 4th of July. The verdict being for the plaintiffs, the defendant excepted.

N. W. Hurmon, for the defendant.

N. S. Howe, for the plaintiffs.

BIGELOW, J. The testimony of one of the plaintiffs as to the direction given to his servant to refuse a further credit to the person to whom the meat was furnished was incompetent. It

Anderson & another v. Brown.

was *res inter alios*, and had no legitimate bearing on the issue before the jury. The question was not as to the direction given by the plaintiff to his servant concerning the credit, but to whom was the credit actually given. A similar point was raised in *Nutting v. Page*, 4 Gray, 584, and it was there held that such evidence was inadmissible. *Exceptions sustained.*

JOHN M. ANDERSON & another vs. INCREASE H. BROWN.

Under Rev. Sts. c. 99, § 19, a review may be granted by the court of common pleas of a judgment of that court, affirming a judgment of a justice of the peace on the complaint of the defendant in review.

On a writ of review of a judgment of the court of common pleas, affirming, on complaint of the defendant in review, a judgment of a justice of the peace, from which an appeal had been taken by the plaintiff in review, but not entered, the case must be tried on its merits, as if an appeal had been duly entered.

In a writ of review of a judgment of the court of common pleas, an omission to allege that the judgment was rendered on complaint of the defendant in review in affirmance of a judgment of a justice of the peace is no variance.

WRIT OF REVIEW, granted by the court of common pleas, of a judgment described in the declaration as rendered by that court in favor of the defendant in review against the plaintiff in review in an action of tort. Trial in the court of common pleas before *Perkins, J.*, to whose rulings, stated below, the defendant in review alleged exceptions.

The judgment sought to be reviewed was in fact rendered by that court, upon complaint of the defendant in review, in affirmance of a judgment of a justice of the peace, in an action of tort brought by the plaintiffs in review against the defendants in review, from which the plaintiffs in review had taken an appeal which they had neglected to enter. This appearing by certified copies of the proceedings before the justice, of said complaint to the court of common pleas and of the judgment thereon, as produced and filed in court by the plaintiffs in review; the defendant demurred to the writ and declaration, upon

the ground that a writ of review did not lie in such case. But the judge overruled the demurrer.

The defendant in review then proved the facts above stated, and the granting of this writ of review by the court of common pleas on petition; and rested his case; and asked the court to rule that the merits of the original action tried before the justice were not open in this action, and that he had therefore made out his case, and the judgment of the court of common pleas should be affirmed. But the judge refused so to rule, and ruled that the defendant in review must go into the merits of the original action to make out a case for affirmation of the judgment.

The defendant also contended that there was a variance between the declaration and the proof, because the declaration did not show that the judgment of the court of common pleas was rendered on the complaint of the defendant praying for an affirmation of the judgment of the justice of the peace. But the judge overruled the objection, and a verdict was taken for the plaintiffs in review, subject to exceptions.

J. H. Robinson, for the defendant in review.

J. A. Gillis, for the plaintiffs in review.

DEWEY, J. That a writ of review may properly be allowed to be brought to reverse a judgment of the court of common pleas rendered upon the complaint of the defendant in review, praying for the affirmation of a judgment of a justice of the peace, seems fully settled by the analogous case of *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray, 415. The language of the Rev. Sts. c. 99, § 19, clearly embraces a case of this kind.

When such review is allowed, and the writ properly issued, the case is open to be tried upon its merits, as in other cases of writs of review. It was therefore the duty of the plaintiff in the original action, on the trial of the writ of review, to produce the proper evidence to substantiate his claim, in the same manner as would have been required, had the appeal been duly entered and no proceedings taken place or complaint been filed for affirmation of the judgment of the justice of the peace. The judgment of the justice was no longer a valid judgment,

Fuller v. Salem and Danvers Loan and Fund Association.

because an appeal had been duly taken therefrom. The judgment of the court of common pleas, affirming that judgment on a complaint, had been opened by the granting of a writ of review. The defendant in error could not therefore properly rest his case upon any former judgment, but must present proper proofs to maintain his claim. The court of common pleas therefore properly ruled that the evidence introduced by the defendant in error did not entitle him to a judgment in his favor.

We perceive no ground for sustaining the position of the defendant in error, that judgment should have been rendered in his favor on account of a variance in the recital of the writ of review as to the nature of the judgment sought to be set aside by the writ of review.

Exceptions overruled



BENJAMIN B. FULLER *vs.* SALEM AND DANVERS LOAN AND FUND ASSOCIATION.

Under a by-law of a loan and fund association, providing that "in case any member by reason of sickness or removal, or through misfortune, is unable to continue the payment of his subscription, he may give notice to the secretary of an intention to withdraw from the association; and in case the directors are satisfied as to the grounds of withdrawal, his whole amount of subscription shall be returned except the entrance fee;" and that "any person wishing to withdraw for the above reasons or otherwise," and who shall have been a member for a certain time, "and be clear of the books," shall be entitled to a certain interest on that amount; any person having been a member for that time, and "clear of the books," may withdraw without leave of the directors.

The St. of 1854, c. 454, § 8, conferring on this court jurisdiction in equity of all disputes between loan and fund associations and their members does not affect the right of any member to sue the association at law.

ACTION OF CONTRACT against a loan and fund association, incorporated under St. 1854, c. 454, to recover back the amount of the plaintiff's subscription.

The parties submitted the case to the judgment of the court upon the following facts: "The plaintiff at the date of the writ had been a member of the association for two years and more,

Fuller v. Salem and Danvers Loan and Fund Association.

and was 'clear of the books;' and, a month or two before the action was commenced, gave a written notice to the secretary of the association of his desire to withdraw from the association, which notice was communicated to the board of directors; but the directors refused to permit the plaintiff to withdraw, because they were not satisfied with the grounds of withdrawal, and upon demand refused to pay the plaintiff the amount of his subscription and interest." The defendants' "articles of association" or by-laws were made part of the case. The only one that bears upon it is copied in the margin.*

J. W. Kimball, for the plaintiff.

J. A. Gillis, for the defendants.

DEWEY, J. The twentieth of the "articles of association" of the defendants clearly contemplates the case of a withdrawal of shares from the common fund under certain contingencies.

In addition to the provision for refunding to the widow or next of kin of a deceased member, a further provision is made for withdrawal by a living member, who "by reason of sickness or removal, or through misfortune, is unable to continue

* ARTICLE XX. *Withdrawal of Shares.* In case of the death of any member, the amount paid into the society shall be refunded to his widow or next of kin, or shall belong to his executors or administrators, who shall enjoy the same benefits and advantages and be subject to the same liabilities as the original holder enjoyed or was subject to; provided the same be claimed during the existence of the association, but if not, shall be forfeited to the association. When there is more than one executor or administrator, the first named only in the letters testamentary, or of administration, shall vote at the meetings of the association. And in case any member by reason of sickness or removal, or through misfortune, is unable to continue the payment of his subscription to the society, he or she may give notice to the secretary of an intention to withdraw from the association; and in case the board of directors are satisfied as to the grounds of withdrawal, the whole amount of subscription paid by the party into the association shall be returned, with the exception of the entrance fee. Any person wishing to withdraw, for the above reasons or otherwise, and who shall have been a member of the association two years, and be clear of the books, shall receive an interest of four per cent., and any member of more than three years' standing shall be entitled to an interest of five per cent., on the amount of funds paid by such member or members into the funds of the association.

the payment of his subscription to the society; he may give notice to the secretary of an intention to withdraw from the association; and in case the board of directors are satisfied as to the grounds of the withdrawal, the whole amount of subscription paid by the party into the association shall be returned, with the exception of the entrance fee."

The case of the plaintiff is not however within this provision but, as he contends, is embraced by the further provision, that "any person wishing to withdraw, for the above reasons or otherwise, and who shall have been a member of the association two years, and be clear of the books, shall receive an interest of four per cent. on the amount of funds paid by such member into the funds of the association." It is under this clause that the claim of the plaintiff can be maintained, if at all.

The defendants insist that no member of the association has, under any circumstances or at any time, a right to withdraw without the assent of the directors. Such may have been the purpose and intent of the framers of the articles of the association. It is certainly to be regretted that so important a matter, and one that may so deeply affect the interests of the association, should not have been made entirely obvious and unquestionable. Giving the natural construction to the language actually used, the court is of opinion that the last clause has given the broad and unqualified right to withdraw from the association, in favor of any person who shall have been a member of the association two years, and be clear of the books; and that such person may, upon proper notice of his wish to withdraw, insist upon the repayment of the amount he has advanced to the association, with interest at the rate of four per cent. *per annum*. This latter provision embraces not only those persons wishing to withdraw for the reason of "being unable to continue the payment of their subscriptions by reason of sickness or removal, or through misfortune," but also persons wishing to withdraw "for the above reasons, or otherwise." We understand this latter expression to be unlimited as to the causes of wishing to withdraw from the association, and not confined to those upon which the board of directors are to be satisfied; and

it is under this view of that provision that we are of opinion that this action can be maintained.

It was further objected that by § 8 of *St.* 1854, c. 454, the jurisdiction over any claims or disputes arising between such corporation and its members was exclusively a jurisdiction in equity by this court. But we think that provision is only a cumulative one, leaving the parties to proceed also at common law, wherever a proper case for a common law remedy was shown. Upon the construction which we have given to the articles of association, a simple duty existed on the part of the defendants of paying over to the plaintiff the amount of his subscription to the association, with interest at the rate of four per centum. There is nothing before us to show that this is not an entirely solvent corporation, or that any cause exists for a *pro rata* distribution of assets of a fund insufficient to discharge all similar existing claims. *Judgment for the plaintiff.*

SAMUEL E. PEABODY vs. COUNTY COMMISSIONERS OF ESSEX

Under the Rev. Sta. c. 7, § 12, and *St.* 1839, c. 139, § 2, ships belonging to a partnership and employed in its business are to be taxed to the partners jointly in the town where their business is carried on, and not separately at their places of residence.

PETITION for a writ of certiorari to quash the proceedings of the county commissioners, refusing to abate a tax assessed by the city of Salem. The case was submitted to the decision of the court upon the following facts:

The petitioner resides in Salem, and is a member of the firm of Curtis & Peabody, merchants, whose place of business is in Boston; Francis Curtis, the other partner, residing in Roxbury. All the property of the partnership is invested in ships and vessels, which are registered in the names of Curtis and Peabody individually, as partowners, conformably to the laws of the United States, although the vessels are regarded and treated as

partnership property. The partnership is taxed in Boston on its joint property. The tax in question was assessed on the petitioner's share in these vessels.

W. C. Endicott, for the petitioner. By the Rev. Sts. c. 7, § 9, all personal property, except in the cases enumerated in § 10, shall "be assessed to the owner in the town where he shall be an inhabitant." This applies to individuals only, who are to be taxed at their place of residence. By § 13 partners in business are to be "jointly taxed, under their partnership name, in the town where their business is carried on, for all the personal property employed in such business;" thus recognizing that, for the purposes of taxation, a partnership has a place of residence. See *Lee v. Templeton*, 6 Gray, 579. This, like other laws governing partnership property, treats it as a whole, without regard to the several interests of the partners.

The St. of 1839, c. 139, is in amendment of §§ 9, 10, and not of § 13, of c. 7 of the Rev. Sts. Section 1 of the St. of 1839, concerning stock in trade, enlarges the provisions of c. 1 of the Rev. Sts. c. 7, § 10; the provision about horses in § 2 of St. 1839 applies to c. 3 of said § 10; and the object of the provision that "all ships or vessels, at home or abroad, shall be taxed to the owners in the towns where they reside," is to determine where ships shall be taxed, whether at home or abroad, or wherever registered. The general object of the St. of 1839, c. 139, was to determine by law where property should be taxed, which was movable and not always in the same place, and which was owned by persons who had a place of business, or whose property was sometimes placed or registered in towns other than where they resided. There was no reason for thus legislating for partnership property, with regard to which there were no exceptions in the statute, and no such difficulty could arise.

Section 2 of St. 1839, c. 139, therefore only provides that ships and vessels shall be taxed where the owner, if an individual, resides; or, if a partnership, has its place of business or statute residence; and thus does not change the law as to the taxation of partnership property.

I. A. Gillis, for the respondents. The provision of St. 1839,

Hale v. Huse.

c. 139, § 2, that "all ships and vessels, at home or abroad, shall be taxed to the owners in the towns where they reside," controls § 13 as well as the other sections of the Rev. Sts. c. 7, even if ships and vessels are to be regarded as partnership property. Otherwise, it would have no application to ships. See also U. S. St. 1850, c. 27, § 9 Sts. at Large, 440. There is no authority for the construction that "residence" means "place of business."

BY THE COURT. The general rule established by the Rev. Sts. c. 7, § 9, is that persons are to be taxed on their personal property in the town of their residence. By § 13 partners are to be taxed as a sole party, and the place of business of partners is likened to the domicil of an individual. Section 2 of the St. of 1839, c. 139, did not alter this, but provided where movable property, as horses and vessels, should be taxed.

*Writ of certiorari to issue.**

WILLIAM HALE vs. TIMOTHY HUSE.

A judgment on an award in favor of the builder against the owner of a house, upon a submission of all demands between them, is no bar to an action against the builder by the owner to recover a sum which he is subsequently, though before paying the amount awarded, obliged to pay to discharge the mechanic's lien of a workman employed by the builder, which has not been included in the award. And the owner may, without previous demand or notice, maintain such action, to recover the amount so paid, including the costs of the proceeding to enforce the mechanic's lien.

The testimony of arbitrators, or a majority of them, is admissible to show whether a certain claim was included in their award.

ACTION OF CONTRACT for money paid to the defendant's use. At the trial in the court of common pleas, before *Mellen*, C. J., it appeared that in 1853 the defendant began to build a house for the plaintiff, but before it was finished a disagreement arose between them, and in January 1854 the defendant sued the

* But by St. 1859, c. 114, "taxes on ships or vessels, owned by a copartnership, shall be assessed to each copartner, to the extent of his interest therein, in the town or city wherein he resides."

plaintiff; and that in March the parties, by submission before a justice of the peace, referred "all matters and demands between them" to three arbitrators, who in May awarded to the defendant a specific sum, for which at June term he obtained judgment and execution, upon which on the 6th of July 1854 a return was made of payment in full, except one hundred dollars.

The plaintiff was allowed, against the defendant's objection, to offer evidence of the following facts: Hiram S. Brown, a laborer who had been employed by the defendant in building the house, filed a petition to enforce his lien in January 1854, which was entered at the ensuing March term of the court of common pleas, and an order of notice was thereon issued and published, returnable at June term, when a default was entered, and the cause continued until March term 1855, when the court passed an order for the sale of the property to satisfy the amount of Brown's bill and costs, which the plaintiff paid. After the execution for the amount of the award had been issued, the plaintiff's agent called upon the attorney of the defendant and of Brown, and told him that Hale ought not to pay the whole amount of the execution as long as Brown's petition was pending, inasmuch as the arbitrators had included Brown's labor in their award. The attorney replied that it was not so included and declared his intention to require payment of both sums, but consented that a hundred dollars should remain unsatisfied upon the execution until it should be decided who should pay Brown. The jury were afterwards instructed that this evidence should not be considered as showing any contract on the part of Huse, but that it was only competent on the question whether the arbitrators did in fact include Brown's claim in their award. On the 21st of April 1855 an *alias* execution was sued out by the defendant for the balance due, and was afterwards returned satisfied in full by a seizure and sale of the plaintiff's property.

The judge, against the defendant's objection, allowed two of the arbitrators to testify, "that in making their award they did not take the matter of Brown's lien into consideration, but allowed for all the work done on the house by the defendant or any of his workmen; and that they arrived at their result by

deducting from the contract price such sum as in their judgment it would cost to finish the house, disregarding the defendant's bill for days' works."

The defendant objected "that the action could not be maintained, on the ground that this was an attempt to impeach collaterally the award of the referees; that no action lies to recover money paid on a judgment of court still unreversed; that the judgment upon Brown's petition could not affect this defendant, being *res inter alios*; that as Hale paid the money on Brown's decree of sale before he satisfied the defendant's execution, he did not pay it to the defendant's use; that the plaintiff's proper remedy, if he has any, was to review or reverse the judgment upon the award; and that he had not called all the referees, but had undertaken to show the judgment of all by the testimony of but two." But the court refused so to rule, and stated that the jury would be instructed that the plaintiff could recover, if he satisfied them that the referees included Brown's claim in the award.

The defendant then requested the court to rule, "that the defendant was entitled to a demand before the action could be maintained; and that the plaintiff could not recover without proof of notice to the defendant that payment had been made of Brown's bill." But this request was overruled.

The defendant then testified, "that when he met the referees the plaintiff spoke of Brown's lien; that the defendant made his claim in writing, and that Brown's claim, or the amount of labor performed by Brown, was not included; that he expressly told the referees so, and stated to them that he did not make any claim for that, and requested them to omit it; and that when this suit was commenced he did not know that the referees had not complied with his request."

The defendant thereupon, renewing his former requests for instructions, also requested the court to instruct the jury, "that if they were affirmatively satisfied that the defendant had had no notice, as above, before action brought, the plaintiff could not recover;" and "that if the jury were satisfied that Huse expressly withdrew the amount of Brown's labor from the con-

Hale v. Huse.

sideration of the referees, then it was not within the submission, and the action could not be maintained." But the court refused; and instructed the jury "that even if they were satisfied that Huse gave the referees notice that he did not claim that, and they nevertheless passed upon it, and included it in the award, the defendant would be liable in this action; and that the plaintiff was entitled to recover, if at all, the amount paid by him upon Brown's petition, including the costs."

The jury returned a verdict accordingly, and the defendant alleged exceptions.

S. B. Ives, Jr., for the defendant.

O. P. Lord, for the plaintiff.

BY THE COURT. The proceedings to enforce Brown's lien were the basis of the claim now in suit, and evidence of those proceedings was therefore rightly admitted.

The statement of the defendant's attorney was competent evidence against his principal, as an admission about a matter in which he was an authorized agent.

The evidence of the arbitrators was not offered to impeach their award, but to show that this claim was not included in it; and for this purpose was clearly admissible. And the obligation of Huse to Hale, now sought to be enforced, could not have been embraced in the submission to arbitration, because it did not become a debt until Hale had paid Brown. Hale could not safely pay Brown till judgment; but then it became the duty of Huse to save Brown harmless. This he did not do.

Huse knew of Brown's claim, and therefore no notice to him was necessary. And the costs were rightly included, for Huse might have stopped them at any time by paying Brown's claim.

Exceptions overruled.

Langley v. Boston and Maine Railroad.

JANE C. LANGLEY *vs.* BOSTON AND MAINE RAILROAD

A railroad corporation incorporated by law in this state is not exempted from liability for the loss of goods delivered to it to be carried over part of its road to the state line, by having previously leased that part of its road to a corporation established by law in an adjoining state, whose road connects with it at the state line.

ACTION OF CONTRACT against the defendants as common carriers, to recover the value of goods delivered to them to be forwarded to Bethel, Vermont, and destroyed by fire in their station at Lawrence in this county.

At the trial in the court of common pleas it appeared that the defendants were the owners of the Methuen Branch Railroad, connecting with their main road and extending thence northwardly to the line between the states of Massachusetts and New Hampshire, where it connected with the road of the Manchester and Lawrence Railroad Corporation, established under the laws of New Hampshire; that the defendants had never carried on said Methuen Branch, but had leased it to the Manchester and Lawrence Railroad Corporation, who had advertised it as part of their road; and that the freight business at Lawrence was in charge of a freight master and assistants appointed and paid by the defendants, but the chief of whom kept in separate books an account of all freight received to go north, and made his returns thereof monthly directly to the Manchester and Lawrence Railroad Corporation.

The defendants contended that, under the provisions of the lease, they were merely acting, in receiving these goods, as the agents of the Manchester and Lawrence Railroad Corporation, and were not liable in this action as common carriers. But *Mellen*, C. J. ruled that they were so liable; to which ruling, after verdict for the plaintiff, the defendants alleged exceptions.

C. P. Judd, for the defendants.

R. Cross & O. P. Lord, for the plaintiff.

BY THE COURT. The defendants could not, by any contract with a corporation established solely by the laws of another

Bigelow & another, Administrators, v. Poole.

state, exempt themselves from their liability for goods delivered to them to be carried over a road constructed and owned by them under a charter from the legislature of this commonwealth. To allow this to be done would be to authorize them by their own act to divest themselves of the duties and liabilities imposed upon them by law, and the performance of which was the consideration upon which their charter was granted, and which thus entered into their contract with the Commonwealth.

This case does not come within the St. of 1838, c. 99, § 1, because one of the two corporations, by whom the contract relied on by the defendants was made, was not established by concurrent acts of the legislatures of New Hampshire and of this state. But even if it had fallen under that statute, the defendants would not have been exempt from liability; for § 3 of that statute expressly provides that notwithstanding any such contract "the corporation owning the railroad shall be liable for all damage done, or injury sustained, on their road, or in the use of the same, in the same manner, and to the same extent, as they would be liable if they performed the transportation themselves." This reservation clearly includes injuries to persons and property.

Exceptions overruled.



HENRY BIGELOW & another, Administrators, vs. ALEXIS POOLE.

An intestate kept and left at his death a little book, "showing," as was stated in a memorandum at its beginning, signed by him, "the moneys I have advanced to my children severally, and to which I shall give credit to any or each of them as they may pay me from time to time." The book was in the form of accounts with each child, one of which showed that a son "had had" a certain sum; and, on the opposite page, these words: "Went into chancery, but paid nothing." He did prove against that son's estate in insolvency the sum thus charged in the book, and interest, and assented to his discharge. *Held*, that this sum was not an advancement, under the Rev. Sts. c. 61, § 9.

APPEAL from a decree of the judge of probate, dismissing a petition of the administrators of the estate of Lott Poole, deceased intestate, for a distribution of his estate among his other

Bigelow & another, Administrators, v. Poole.

children, omitting the appellee as having had his whole share advanced to him. The facts appear in the opinion.

E. R. Hoar & H. Gray, Jr., for the appellants, cited Rev. Sts. c. 61, §§ 6-10; *Bulkely v. Noble*, 2 Pick. 340; *Gilbert v. Wetherell*, 2 Sim. & Stu. 254; *Berry v. Morse*, 1 H. L. Cas. 71; *Clark v. Warner*, 6 Conn. 355.

W. L. Brown, for the appellee.

METCALF, J. It is the settled law of this commonwealth, that an advancement, whether of real or personal property, made by an intestate to his child or other descendant, must be proved by the evidence prescribed by our statutes, and by no other. *Osgood v. Breed*, 17 Mass. 358. *Ashley's case*, 4 Pick. 24. *Bullard v. Bullard*, 5 Pick. 527. *Barton v. Rice*, 22 Pick. 509, 510. And by the Rev. Sts. c. 61, § 9, (a reënactment of St. 1805, c. 90, § 3,) "all gifts or grants shall be deemed to have been made in advancement, if they are expressed in the gift or grant to be so made, or if charged in writing by the intestate as an advancement, or acknowledged in writing, as such, by the child or other descendant." The sole question now before us is, whether Mr. Poole, the intestate, charged in writing any sum as an advancement to his son Alexis.

In *Bulkely v. Noble*, 2 Pick. 340, Chief Justice Parker said: "No particular form of words is required by the statute to constitute an advancement; but it must be charged as such, that is, it must be charged in such a manner as to show that to have been the intention." And it was decided in that case, that the words "articles that I let my daughter N. have," written in a book of memoranda, made by the father, of advancements to his other children, showed an intention to charge an advancement to N. *Noscitur a sociis*. But in *Ashley's case*, above cited, it was held that money charged by a father against a child, in the ordinary form of an account book, could not be deemed an advancement; that there was nothing to distinguish such charge from the other book debts of the father.

We are of opinion, in the present case, that the evidence fails to show that the intestate meant to charge his son Alexis as for an advancement of his share, or a part of his share, of the

Bigelow & another, Administrators, v. Poole.

intestate's property. The intestate's small book, which is in the case, does not purport to be a book containing entries of advancements to his children, in the sense in which we are now considering advancements. On the title page (as we may call it) of that book is this memorandum, signed by the intestate: "Small book referred to in my last will and testament, dated Aug. 2d 1843, showing the moneys I have advanced to my children, severally, and to which I shall give credit to any or each of them, as they may pay me from time to time. Revised and corrected August 7th 1847, on making another last will and testament." On the second page are these two entries: "On the 2d day of August 1843, my son Alexis Poole has had \$1625.00." "On the 7th day of August 1847, my son Alexis Poole has had, beside interest to this day, \$1600.83." On the opposite leaf is written "Credt. Went into chancerv, but paid nothing." The facts show that in 1853 Alexis took the benefit of the insolvent law, and the intestate proved the above claims, with interest, against his estate in insolvency; that Alexis was discharged from all his debts; and that the intestate consented to his discharge. All this shows a loan, and not an advancement of the son's portion; a debt which the son was to pay, with interest. Such we must have regarded it in law, on the face of the book alone. But, if there had been doubt of this, the treatment of it as a debt by the intestate would decide the question.

In the same book, on the left pages, are entries, made by the intestate, stating the amount that each of his other sons "has had," including interest to a certain day; and on the right pages entries giving them credit for partial payments. The book also states how much each of his daughters "had" (without giving dates) on their respective marriages. These, clearly, are not charges of advancements. The charge against Alexis, therefore, cannot be treated as an advancement, by reason of its being in the same book with those charges.

The last three cases cited and relied on by the appellants' counsel show that this would be held to be an advancement under the English *St. 22 & 23 Car. 2, c. 10, § 5*, of which, says

 Arthur v. Flanders.

Hosmer, C. J., the Connecticut statute is almost a literal transcript. *Hatch v. Straight*, 3 Conn. 34. The difference between that statute and ours will appear by referring to its terms. After directing a distribution of one third of an intestate's surplus property to his widow, and the residue to his children, in equal portions, except such as may have had any estate by settlement of the intestate, or shall have been advanced by the intestate, by portion equal to the share which shall, by such distribution, be allotted to the other children to whom such distribution shall be made, the fifth section thus proceeds: "And in case any child, other than the heir at law, who shall have any estate by settlement from the said intestate, or shall be advanced by the said intestate in his lifetime, by portion not equal to the share which will be due to the other children, by such distribution as aforesaid; then so much of the surplusage of the estate of the intestate to be distributed to such child or children as shall have any land by settlement from the intestate, or were advanced in the lifetime of the intestate, as shall make the estate of all the said children to be equal, as near as can be estimated." What shall be deemed an advancement, or by what evidence it shall be proved, is not here prescribed, as it is in our revised statutes. See Lovell on Wills, (12th ed.) 140; 2 Wms. on Executors (4th Amer. ed.) 1288-1292.

Decree of the judge of probate affirmed.

ANDREW ARTHUR vs. ALFRED FLANDERS.

n officer seizing, under a search warrant duly issued for intoxicating liquors, liquors not described in the warrant, is liable to an action by the owner thereof, notwithstanding *St. 1855, c. 215, § 38.*

ACTION OF TORT for taking intoxicating liquors out of the plaintiff's dwelling-house under a warrant issued to the defendant by a justice of the peace, pursuant to *St. 1855, c. 215, § 25*

Arthur v. Flanders.

and which were afterwards ordered by the justice, for want of a sufficient description of them in the warrant, to be returned to the plaintiff. The defendant contended that, as the plaintiff had not proved that the liquors were legally kept, he was within the provision of *St. 1855, c. 215, § 38*, that "no action shall be had or maintained against any sheriff, deputy sheriff, chief of police or deputy chief of police, or constable, or their assistants, for executing any warrant or order issued under this act by any justice or court competent to try the same; nor shall any action be had or maintained against any officer for seizing, detaining or destroying any intoxicating liquor, or the vessels containing it, unless such liquor and vessels were legally kept by the owner thereof." But THE COURT were of opinion, that the defendant, because he took articles not mentioned in the warrant, was a trespasser, and liable to this action. See *Ewings v. Walker*, 9 Gray, 95.

Judgment for the plaintiff.

S. B. Ives, Jr., for the plaintiff.

W. C. Binney, for the defendant.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF SUFFOLK, NOVEMBER TERM 185.
AT BOSTON.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. BENJAMIN F. THOMAS, } JUSTICES.
HON. PLINY MERRICK,

DANIEL W. LORD vs. NEPTUNE INSURANCE COMPANY.

Insurers on the freight of a ship for a voyage are not liable for a total loss, where there has been no total loss of the ship, and the goods could have arrived *in specie* at the port of destination; although the ship has been obliged by a peril insured against to put back to her port of departure, and the goods, after being damaged by that peril to the extent of more than half their value, or to the extent of goods yielding more than half the freight, have been sold there according to the interests of all parties except the insurers on freight.

If a ship is obliged by perils of the sea to put back to her port of departure, and her cargo is there sold by the master for the interest of all parties except the insurers on freight, the shipowner is not entitled to freight; and, if he defends, on a claim of freight, a suit brought against him by the owner of the cargo for the proceeds of such sale, cannot recover from the underwriters on freight any part of the expenses of such defence.

Insurers on freight are liable for the freight of goods jettisoned, without waiting for the adjustment of the general average; although the policy provides that any loss "shall be paid within sixty days after proof and adjustment thereof."

 Lord v. Neptune Insurance Company.

Under a policy which exempts the insurers from liability for any partial loss on certain goods perishable in their nature, unless it amount to seven per cent. and happen by stranding; and for partial loss on other goods or on the vessel or freight, unless it amount to five per cent.; the insurers are liable for a partial loss exceeding five per cent. on the freight of a cargo consisting of such perishable articles and of other goods, although not occasioned by stranding.

ASSUMPSIT on a policy of insurance upon freight. The case appears in the opinion. It was first argued at March term 1852, and an opinion delivered at March term 1854. The plaintiff then moved for a further argument, which was granted, and had at November term 1854.

R. Choate & E. A. Dana, for the plaintiff, cited some of the cases referred to in the opinion, and *Everth v. Smith*, 2 M. & S. 284; *Hurtin v. Union Ins. Co.* 1 Wash. C. C. 530; *Simonds v. Union Ins. Co.* 1 Wash. C. C. 443; *Miston v. Lord*, 1 Blatchf. C. C. 357; *American Ins. Co. v. Center*, 7 Cow. 583, and 4 Wend. 45; *Bryan v. New York Ins. Co.* 25 Wend. 617; *Whitney v. New York Firemen Ins. Co.* 18 Johns. 210, 211; *Ogden v. General Mutual Ins. Co.* in New York Court of Appeals (MS.) [referred to in *S. C.* 2 Duer, 205 note, 211, 213, 214]; *Hudson v. Harrison*, 3 Brod. & Bing. 97, and 6 Moore, 288; *Rosetto v. Gurney*, 11 C. B. 176; *Reimer v. Ringrose*, 6 Exch. 266, 267; *Blackett v. Royal Exchange Assurance Co.* 2 Cr. & J. 244; *Donnell v. Columbian Ins. Co.* 3 Sumner, 266; Benecke on Ins. 448, 449; 1 Arnould on Ins. §§ 22, 31, 83, 87; 2 Arnould on Ins. §§ 318, 356, 357, 373, 374, 397, 413; 2 Phil. Ins. (2d ed.) 210, 211, 454, 464, 467, 498, 499.

S. Bartlett & C. P. Curtis, Jr., for the defendants, besides some of the authorities cited in the opinion, cited *Herbert v. Hallett*, 3 Johns. Cas. 93; *Saltus v. Ocean Ins. Co.* 14 Johns. 138; *Williams v. Kennebeck Mutual Ins. Co.* 31 Maine, 455; *Waln v. Thompson*, 9 S. & R. 121; 2 Arnould on Ins. §§ 325, 338, 353 (Amer. note), 374; 2 Phil. Ins. 92, 137.

SHAW, C. J. The policy on which this action is founded was made on the 14th of January 1847, and the defendants thereby insured the plaintiff, for whom it might concern, \$6000 on the freight of the Barque Dana, at and from New York to Havre, the freight being valued at the same sum, \$6000. The same form

of policy appears to have been used, whether the insurance were on ship, cargo or freight, so that in a policy on freight many of the terms and provisions in the printed part of the policy have no relevancy to the actual subject of the contract.

From the agreed facts it appears that the vessel sailed on the voyage contemplated in the policy on the 27th of January 1847, with a full cargo, on freight payable according to several bills of lading upon the delivery of the goods at Havre. The cargo consisted principally of wheat, flour, green hides, with a few packages of palm leaf, barrels of bacon and kegs of lard.

On the third day out the vessel encountered a violent gale, by which she was thrown on her beam ends, sprung a leak, and a considerable quantity of wheat and flour and of the ship's provisions was thrown overboard to relieve the vessel. In consequence of this disaster, the vessel put back to New York, where it became necessary to discharge the cargo in order to repair the vessel. Most of the articles composing the cargo were more or less damaged, and would require time and expense to put them in a fit condition for reshipment. The owners of the several parts of the cargo, though they had notice of the condition of the goods, declined either to demand them back as they were, or to cause them to be dried and placed in a condition to be forwarded in the vessel, or to require the shipowner to proceed, or to give any directions on the subject; in consequence of which the master sold the goods at auction, and the proceeds came into the hands of the shipowners. They refused to pay over these proceeds to the respective owners and shippers of the goods, without the payment of freight on them. On suit being brought, the shipowners defended on the ground that freight was due, and that they were not bound to account for the proceeds of the damaged goods unless freight was paid. But it was decided otherwise, and the expenses of those suits are claimed as part of the loss sought to be recovered in this action.* After being repaired, the vessel took in another cargo

* The plaintiff, in support of this point, relied upon this clause in the policy: "In case of any loss or misfortune, it shall be lawful for the insured, his factors,

Lord v. Neptune Insurance Company.

of corn and other articles, and sailed for Belfast, Ireland, and there delivered that cargo and earned freight thereon.

It will not be necessary to state all the facts in detail; the result is, that the part of the cargo, not thrown overboard to lighten the ship, was brought back to New York; that it remained there *in specie*, and after drying and preparation, which would have taken several months, part of it might have been reshipped on board the Dana, or placed on board of other vessels bound to Havre, and in that condition would have arrived at Havre, much deteriorated in value perhaps, but capable of being delivered *in specie* to the consignees. It is conceded that in the mean time freights had considerably risen in price, so that the vessel could obtain a higher freight in a new voyage than she would have been entitled to, had she successfully performed the voyage for which she was insured, and earned full freight therein. It is further conceded that it was for the interest of the owners both of vessel and cargo, and of the insurers of the cargo, that the whole of the cargo brought back should be sold in its damaged condition, as it was, by the master, rather than to be reshipped and forwarded to its original destination. The question is, whether, under these circumstances, the assured are entitled to recover as upon a total loss of freight.

The general rule governing the rights of the respective parties to an insurance on freight, as a distinct and substantive subject of insurance, was fully considered by this court in the case of *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405.

The term "freight" has several different meanings; as the price to be paid for the carriage of goods; or for the hire of a

servants and assigns, to sue, labor and travel for, in and about the defence, safeguard and recovery of the said freight or any part thereof, without prejudice to this insurance; to the charges whereof the said insurance company will contribute in proportion as the sum insured is to the whole sum at risk." And he cited the following authorities: 1 Arnould on Ins. § 46; 2 Arnould on Ins. § 413, & cases cited; 1 Phil. Ins. 692, 693, & cases cited; 2 Phil. Ins. 243, 464, & cases cited; *Watson v. Marine Ins. Co.* 7 Johns. 57; *Hastie v. De Peyster*, 3 Caines, 190; *Maggrath v. Church*, 1 Caines, 196; *Potter v. Providence Washington Ins. Co.* 4 Mason, 298. The defendants cited *Potter v. Ocean Ins. Co.* 3 Sumner, 27

Lord v. Neptune Insurance Company.

vessel under a charter party or otherwise; and sometimes to designate goods carried, as "a freight of lime," or the like. But as a subject of insurance, it is used in one of the two former senses; and in this policy it means plainly the aggregate of the prices to be received, at agreed rates, for the carriage of several parcels of specific goods, as expressed in several bills of lading. According to the well known rule of the maritime law, as between the shipper and shipowner, freight is payable upon goods shipped, on their arrival and delivery to the shipper or his consignee at the place of destination, and not otherwise. The effect therefore of the insurance on freight is a guaranty that the goods shall not be prevented from arriving at the destined port by any of the perils insured against; and consequently, if they are prevented from so arriving by the direct intervention of any of those perils, whereby the shipowner is deprived of the power of receiving his freight from the shipper, the underwriter will pay the loss. If it is a policy on freight of a cargo laden on board the vessel for the voyage described, especially when the vessel has sailed on that voyage, the policy attaches to the freight of that particular cargo. It follows therefore, as a general rule, with some exceptions, that after the policy has so attached to that vessel and cargo for that voyage, if the vessel is wholly lost by one of the perils insured against, the power of earning the freight is lost, and the insurer is liable on his contract. So if the cargo is wholly lost by one of the same perils, it cannot be carried and earn freight, and therefore it is a total loss of freight, and the insurer is liable. The difficulty lies in distinguishing, in particular and often complicated cases, what facts constitute such total loss of either vessel or cargo, and to what extent the effects of such loss may be mitigated or relieved in favor of the different parties interested.

In the present case no question arises in regard to the vessel; for, though she encountered a violent gale at sea, and was damaged by it, yet she came safely back to port, was soon repaired at a comparatively moderate expense, and was capable of proceeding on the voyage again. In respect to what constitutes a total loss of a vessel, involving a loss of freight, some difference

exists between the rule of the English law and that of America, the former considering that she is not totally lost if, in the place where she is, under all circumstances, she can be repaired and put in a condition to prosecute the voyage, at a cost less than her value when repaired ; whereas it is held in America that the vessel sustains a constructive total loss, which the owner, if he choose, may treat as a total loss by abandonment, if she cannot be repaired for less than half her value, making customary allowances. But there is no intimation that, under either rule, the Barque Dana had sustained a total loss.

The question then is reduced to this ; whether the cargo was so totally lost that it was impossible to carry it forward, and earn the freight, which would be due upon it on delivery ; and the court are of opinion that it was not. In deciding this question, we must consider what it would have been necessary for the shipowner, the assured in this case, to do, in order to earn his freight. The rule as between shipper and shipowner is, that if the goods arrive at the port of destination *in specie*, capable of being delivered, the owner has carried and is entitled to receive his freight, although they are so deteriorated, by sea damage or otherwise, that they are of no value. If the goods are carried and ready for delivery, the underwriter on freight has made good his guaranty. If the goods have sustained damage by perils of the sea, the owner of them must look to his underwriter on goods, unless he stands his own insurer ; the carrier cannot look to the insurer on freight. The question therefore is, not whether the flour, grain and other articles would have been of any or what value, or of sufficient value to pay the freight, but whether, on such reshipment and arrival, they would have remained *in specie*, as flour, wheat, bacon, palm leaf, &c. If so, then it is clear that they were not so totally lost that the plaintiffs were prevented by the perils insured against from carrying them and earning the freight on them.

The distinction between the case of goods destroyed by a peril of the sea, so that they cannot arrive *in specie*, and goods damaged by a similar peril, and so deteriorated that, though they may arrive *in specie*, they will be of little or no

value, is well established by cases of insurance on goods. It was formerly doubted whether, if goods insured were damaged to more than half their value by a sea peril, and the vessel proceeded to an intermediate port to repair, and the goods when taken out still remained *in specie*, though they would wholly decay before reaching the place of destination, the assured could recover a total loss without abandonment. But it is now well settled that he can. Where hides were thus damaged and carried to an intermediate port, though they remained as hides there, and were sold by the master as hides, yet, it being found that, from incipient putrefaction already begun, they would totally perish before arriving at the port of destination, it was held, that the assured could recover a total loss without abandonment; not because the goods were sold, or because a sale was necessary or expedient; but because the loss was absolutely total, before the sale, by the first peril. *Roux v. Salvador*, 1 Bing. N. C. 526, and 3 Bing. N. C. 266; reported also in 1 Scott, 491, and 4 Scott, 1. This case was first tried in the court of common bench, and it was there held to be a total loss, but not recoverable without abandonment, and judgment was given for the defendants. This judgment, upon error, was reversed by the court of exchequer chamber, upon the ground that it was a case of absolute total loss without abandonment; that the peril of the sea affected and injured the goods to such a degree that, before they could reach their place of destination, they would actually have ceased to exist; and that an abandonment was not necessary to give the insurer the benefit of the proceeds, but that such proceeds were a salvage in the hands of the assured, to be deducted from the total loss.

This case of *Roux v. Salvador*, though an insurance on goods, and not on freight, is very instructive as to what constitutes an actual or absolute total loss of goods, independently of any abandonment, and in what cases any loss, not absolute, complete or total, may, at the election of the assured, be treated as a technical total loss by abandonment. The voyage was from Valparaiso to Bordeaux, and the vessel went into Rio Janeiro to repair. The hides were damaged by a peril of the sea to

more than half their value, yet remained *in specie*; but the proof was, that, before the hides could reach their port of destination, by the necessary operation of natural causes they would cease to be hides. There was therefore nothing to abandon. In this case, in the court of error, where the case underwent great consideration and the opinion was given by Lord Abinger, the questions of the right of the assured to abandon, and the principle upon which, by the English law of insurance, abandonment is required, are defined with great exactness. Abandonment is held to be necessary only where the subject matter of insurance, be it ship or goods, or some portion of it, specifically exists, and may enure to the benefit of the insurer, if seasonably relinquished to him; but if the subject matter and every part of it is specifically lost and gone, that subject is totally lost without abandonment. There may be fruits or results of it of great value, as proceeds of sale, in the hands of the assured or his agents, or of public officers, or admiralty courts, or claims over for indemnity against individuals or governments, all which may go to diminish the actual loss. But abandonment is not necessary to enable the insurers to have the benefit of these by way of salvage. If they have been actually realized or received by the assured, by himself or his agents, the amount of such salvage will be deducted from the total loss, on adjustment. If they have not been so received, they will equitably belong to the insurer, after payment of a total loss; and if they be afterwards received by the assured, it will be to the use of the insurer.

The case is a strong authority to this point; that if goods on board ship are damaged by one of the perils insured against, and upon being brought into a port other than that of their destination, the damage is there found to be of such a nature and extent that, taking into consideration their actual condition, the distance of the port of destination and the time necessary for their transportation to such port, and the nature of the commodities, it can be shown that they must totally perish and cease to exist before they can arrive, then they are in effect totally destroyed by the first direct action of the sea peril, they cannot be carried and delivered to the consignee, so as to enable the shipowner to

earn his freight of the ship. They are as effectually and completely destroyed by such peril as if, instead of sea damage, they had been struck with lightning and consumed. And in this respect it seems to us immaterial whether the goods are memorandum articles or goods perishable in their nature, or not; they are as effectually annihilated by the direct action of the peril insured against, and so totally destroyed by such peril, for all purposes of earning freight by their carriage, in the one case, as in the other. In both cases the shipowner is entirely deprived of obtaining his freight by a peril insured against; the loss of that freight is a total loss to him without abandonment.

Another case was cited at the argument as having a strong bearing on the present case, that of *Hugg v. Augusta Insurance & Banking Co.* 7 How. 595. It was decided by the highest authority, the supreme court of the United States, and has a strong bearing upon some points of the present case. But that case differed essentially from the present in many particulars. It was, like the present, an insurance on freight, of the Barque Margaret Hugg from Baltimore to Rio Janeiro and back to Havana or Matanzas or a port in the United States.

The form of the policy in that case does not appear in the report; but from an authenticated copy, with which we have been furnished, it appears to have been written on a blank form, designed to be used alike for insuring ship, cargo and freight indiscriminately, and contains all the usual clauses applicable to each subject. It contained a clause that bar and sheet iron, and a great variety of enumerated articles usually embraced in the memorandum, "and all other articles perishable in their nature, are warranted by the assured free from average, unless general." *

* The whole of this paragraph in that policy was thus: "It is also agreed, that bar and sheet iron, wire, tin plates, salt, grain of all kinds, tobacco, indian meal, fruits (whether preserved or otherwise), cheese, dry fish, vegetables and roots, hempen yarn, cotton bagging, pleasure carriages, household furniture, furs, skins and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, free from average under twenty per cent, unless gen

Lord v. Neptune Insurance Company.

The effect of this clause was that no partial loss of such articles could be recovered, except as a contribution to general average. The court assumed there, and we think the argument on both sides went on the ground, that that warranty extended as well to partial loss of freight on perishable articles, as to partial loss on the articles themselves; and as the entire cargo on the homeward voyage, to the freight of which the policy attached, consisted of jerked beef, which was a perishable article, and so found by the jury, the whole inquiry turned upon the question whether this cargo had entirely perished so as to prevent the shipowner from proceeding and delivering the residue, and earning the freight on the part so carried, when a considerable portion of the beef remained *in specie*, and might have been transported to the port of destination, in the same or another vessel, in a passage of three or four days.

In the present case, the warranty differs in form, being an agreement that the insurers shall not be liable "for any partial loss on salt, grain, fish, fruits, hides, skins, or other goods esteemed perishable in their nature, unless it amount to seven per cent., and happen by stranding; nor for partial loss on other goods, or on the vessel, *or freight*, unless it amount to five per cent.; exclusive, in each case, of all charges and expenses of ascertaining and proving the loss." On such a policy, it may well be doubted whether insurers on freight, even on perishable goods, would not be liable for a partial loss on freight exceeding five per cent. by a general ship, and on a cargo consisting of various articles, some perishable and others not.

But there is another particular in which this case differs essentially from that of *Hugg*, which is, that in that case the whole cargo on which freight was to be earned consisted of one perishable article, belonging to the same owner; but in the present case the cargo consisted of various articles forming several shipments, from distinct owners, and therefore the same objection

eral; and sugar, flax seed and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, and pepper in bags or bulk, free from average under ten per cent., unless general."

does not lie against a recovery for a partial loss of freight, partial only because some portion of the freight was or might have been earned, but, as far as it went, total in its nature, leaving nothing to abandon, and entitled to no salvage.

When, therefore, we say that the case of *Hugg v. Augusta Insurance & Banking Co.* is a strong authority in the present case, we mean this; that it establishes conclusively these points: that when goods are shipped on board of a vessel, to be carried to a designated port, whether consisting of perishable or other articles of merchandise, if they remain *in specie* and arrive, the shipper on delivery will be bound to pay the stipulated freight, although the goods are damaged by perils of the sea so as to be utterly worthless; that although the voyage may be retarded, though the goods may be long detained at an intermediate port, and be found to be much damaged, but still can be carried on to the place of destination and there delivered *in specie*, if the shipowner, or the master as his agent, where it is most for the interest of the shipowner and owner of the goods, leaves them or sells them at such port of refuge, he fails indeed to earn the freight which he might have earned; but such failure is not caused by the perils insured against, but by the voluntary act of the assured, and so the underwriter on freight is not liable for such loss.

It is stated, as a fact agreed in this case, that the act of the master in making sale of the damaged goods, the owner of those goods having declined to give any directions respecting them, was a proper and reasonable course so far as all interests were concerned, except that of the underwriters on freight; and the plaintiff alleges, and the defendants deny, that it was also most for the interest of these underwriters. We consider this question as wholly immaterial; that the propriety of such sale of the damaged cargo was a question solely between the master and the owners of the goods, with which these underwriters had no concern; and it should be decided on its own considerations, in the same manner, whether the shipowners had their freight insured or not. One thing is certain, that the master had the rightful possession of the goods for the purpose of carriage, and

Lord v. Neptune Insurance Company.

that the owners of the goods could not rightfully demand and obtain the possession, and thus deprive the shipowners, without their consent, of the right of carrying the goods forward, damaged or undamaged, without paying the full freight due on them by the bill of lading. If, therefore, the shipowners, or the master in their behalf, sold the goods whilst they remained *in specie* and might have gone to their destination, they lost their freight, not by any one of the perils insured against, but by their voluntary preference to abandon the voyage and employ their vessel in some other enterprise.

A very similar case was decided by this court, *Clark v. Massachusetts Fire & Marine Ins. Co.* 2 Pick. 104. It was an insurance on freight on a large shipment of tobacco from Richmond, Virginia, to Nice. The vessel met with sea damage, and put into the port of Kennebunk to repair. The vessel could be seasonably repaired, though the necessary delay would prove a serious damage to the owner of the tobacco, by the state of the market; and by mutual consent the shipper received the tobacco to be forwarded by another vessel, stipulating to pay freight *pro rata itineris*, if any was due; but it was found that freight was as high from Kennebunk to Nice as from Richmond, and so no freight *pro rata* had been earned. In a suit against the underwriter on freight, it was held by the court that, the property having been thus voluntarily surrendered and the voyage relinquished, the loss of freight was not occasioned by any peril insured against, and that the underwriter was not liable.

We do not mean to intimate that the sale of the goods by the master in New York, diminished as they were in quantity, and in their damaged condition, was not a prudent, justifiable and proper measure, beneficial to all parties. On the contrary, so far as the case throws any light on the subject, we think it was so. But if anybody could complain, it would be the owner of the goods, against the master and shipowners, for a non-compliance with their contract to carry the goods as stipulated in the bill of lading; and whether the master could justify himself against such claim by the exception of perils of the sea, was solely a question between him and the shippers. In point of

fact the owners of the goods afterwards affirmed the act of the master in making the sale, by claiming the proceeds of the goods thus sold. As he professed to act as their agent in making the sale, their claiming the proceeds afterwards amounted to a ratification, and made the sale good. But if the shipowners, by the master acting under their direction, determined to relinquish the voyage, and redeliver the damaged goods to the shippers, whether entitled to receive any freight *pro rata* upon them, or to sell them on shippers' account, if the damaged goods or any part of them remained *in specie*, and might have been delivered at the place of destination, damaged or undamaged, and earned freight, then the assured voluntarily abandoned his claim for the freight of these goods on this voyage, and therefore has no claim for the loss of such freight against the insurer on freight.

In the case of *Hugg v. Augusta Insurance & Banking Co.*, already cited, it was held that, in construing the contract of insurance of freight, the interest of the insurer and of the assured in the cargo was not to be taken into account, nor in any way regarded, in determining whether a total loss of freight had happened from any of the perils insured against. The questions are distinct, as they affect the construction of contracts made *diverso intuitu*.

The doctrine that the contracts of owners and shippers and the several classes of insurers are distinct, and to be governed by considerations severally applicable to each, and the nature and obligation of the contract of insurance on freight, are well illustrated by a late case in the House of Lords. *Scottish Marine Ins. Co. v. Turner*, 1 Macqueen, 334, and 4 H. L. Cas. 312, note. It was an insurance on freight from Quebec to Liverpool. The vessel met with damage by perils of the sea and sprung a leak, but was kept afloat by pumping, and arrived at Liverpool, where the cargo of lumber was delivered to the consignee and the freight paid. But the vessel, being found to be a wreck, was abandoned to the underwriters on the vessel; yet as the abandonment related back to the time of the disaster, it was held to carry all the pending freight, not then fully earned and due, with it, and therefore the shipowners who had received the

Lord s. Neptune Insurance Company.

freight were held bound to account for it to the abandonees, the insurers of the ship. *Stewart v. Greenock Marine Ins. Co.* 2 H. L. Cas. 159, and 1 Macqueen, 328. Upon this, the assured in the policy on freight brought this action to recover a loss, on the ground that, although the cargo reached its port of destination, and freight on it was paid by the consignees to the shipowners, yet they could not hold it to their own use ; that it was received to the use of the abandonees of the ship, which was lost by a sea peril, and therefore the freight was lost to them by such peril. But it was decided by the House of Lords, reversing the judgment of the court of Scotland, that when the cargo was brought to its port of destination, though in a wrecked ship, the contract of the insurer on freight was fulfilled ; that whether the owners of the vessel had an insurance on the vessel or not, and what were the terms of that contract, were immaterial to the insurer on freight ; that if the shipowners abandoned their freight to their insurers, it was in pursuance of a contract with which the insurers on freight had no concern, and that they were not liable.

Having cited this case as an authority, it seems proper, in order to avoid a misapplication of it, to notice that a different rule prevails in Great Britain and this country, in regard to the relative rights of shipowners on the one side, and the respective insurers of ship and freight on the other. By the British law, no freight is considered as earned until the arrival of the ship and goods ; and there is no apportionment of a pending freight, not actually accrued ; and therefore if there be an abandonment of the vessel, in consequence of a disaster occurring during the voyage, though at a late period of it, the whole of such freight passes to the abandonee of the ship, and no part of it to the insurer of freight, even though freight may have been in form abandoned to him. But by the American rule such freight is equitably apportioned, according to the proportion of the voyage performed at the time of the disaster, to which time the abandonment in both cases must refer back. What was equitably earned before that time goes to those who are previously entitled to the earnings of the vessel, or their abandonees, the

insurers of freight; that part earned after such disaster goes to the abandonees of the ship, as owners from that time. If at that time, by a fair estimate, nine tenths of the entire voyage have been performed, the abandonees of freight will be entitled to nine tenths, and the abandonees of the ship to one tenth of the freight for the voyage. It seems necessary that this difference be borne in mind in citing English authorities, in reference to American cases, both in reference to the rights of parties and as to the necessity and legal effect of abandonment on freight policies. Mr. Arnould admits that the American rule of apportioning the freight in such cases is more equitable, more consonant with the theory making insurance a contract of indemnity, than the English, and equally practicable; but he shows from unquestionable judicial authority that the contrary rule is there well established. *Case v. Davidson*, 5 M. & S. 79, and 2 Brod. & Bing. 379. 2 Arnould on Ins. § 399. 2 Phil. Ins. (3d ed.) § 1649.

It appears by the facts agreed in this case, that though a large part of the cargo was more or less damaged by the disaster, yet some considerable part of it was saved, and remained *in specie* and might have been transported to Havre; that the vessel was repaired and competent to carry it, and therefore the freight insured was not totally lost by a peril insured against.

There is no ground for maintaining that the plaintiffs could successfully claim any freight *pro rata itineris*; both because the owners of the goods did not demand that their goods should be delivered up at New York; and because they were brought back to the port of shipment, and no beneficial service had been done by the shipowners. *Vlierboom v. Chapman*, 13 M. & W. 230.

This is also an answer to the claim of the plaintiffs to recover in this suit a proportion of the expenses of defending the suits brought against the plaintiffs by the owners of the goods, for the proceeds of those sold. There was no plausible ground on which the plaintiffs, as shipowners, could contend that they had any claim against the shippers, by way of lien, set-off or otherwise, for the payment for freight of the goods taken out and left at New York.

If any reliance is placed on the fact set forth in the agreement,

that the Barque Dana subsequently proceeded on another voyage to Europe and obtained freight, and that such freight can enure, by way of salvage or otherwise, to the benefit of the defendants, it is a sufficient answer to repeat that this policy was an insurance on a specific cargo; that the policy had attached and the risk commenced. The voyage afterwards made was a different voyage, to a different port, with a different, though somewhat similar cargo, shipped by other parties. *Jordan v. Warren Ins. Co.* 1 Story R. 342, and authorities there cited.

There is no ground to insist that a salvage freight might have been obtained by forwarding the goods by another vessel; for it is agreed that freights were higher from New York to Havre after the vessel returned to port, than the rates stipulated to be paid on the original shipment.

As far as we can perceive from the facts agreed, the course pursued by the master and shipowners, though it might exempt the insurers from further insurance on freight, by the voluntary relinquishment of the voyage, was best for all parties concerned; for the owners of the vessel, because it relieved her from a burdensome enterprise, and enabled the owners immediately to employ her in other, perhaps more profitable service; for the owners of the goods, and their insurers, if any, because it relieved them from the expense of preparing the goods for re-shipment, from the danger of further deterioration and loss of value of the damaged goods, and from the payment of freight. And the goods may have sold for as much in their damaged state, at New York, as they would at Havre.

In coming to the conclusion that this was not a total loss of freight, we place no reliance on the fact that there was no abandonment. We are of opinion, that if it was not an actual total loss in its nature, it was not a loss which would enable an assured, by an abandonment, to recover as upon a technical total loss. An abandonment must be of some part or portion of the subject insured. If that subject, whatever it is, is absolutely gone, beyond the control of the assured, though there may be proceeds of sale or other salvage, yet of that the insurer will have the benefit, without abandonment. This distinction was

Lord v. Neptune Insurance Company.

the sole ground of decision in the case of *Roux v. Salvador*, before cited. See *Smith v. Manufacturers' Ins. Co.* 7 Met. 448. If the assured has already received it at the time of adjustment, the insurer will have credit for it as a deduction from the total loss; if not, and if a total loss is paid to the assured, anything received by the assured afterwards, by himself or his agents, he will hold to the use of the insurer, and an action will lie for it. Considering abandonment then as strictly applying to the subject of insurance, and in this case to the freight, there was clearly nothing to abandon. No freight *pro rata itineris peracti* had been earned, because the goods were brought back to the port of shipment; there was no valuable right to earn freight, by forwarding the goods capable of being transported to Havre, because it would cost more than the freight to forward them. There was no freight earned on that voyage, which, according to the American rule, contrary to the English as above stated, could have been apportioned, so that an equitable part might vest in the abandonee of the ship, and another part in the abandonee of the freight; so that the same rule which governs the right of the assured on freight to recover a total loss, as held in the English courts, is applicable to this case. That such loss of freight, if not total in its nature, cannot be converted into a technical total loss by abandonment, seems to be well settled. *Green v. Royal Exchange Assurance Co.* 6 Taunt. 68, and 1 Marsh. 447. *Idle v. Royal Exchange Assurance Co.* 8 Taunt. 755, and 3 Moore, 115 *Mount v. Harrison*, 4 Bing. 388, and 1 Moore & Payne, 14. An offer to abandon, or an actual formal abandonment of freight in this case, would not have altered the character of the loss.

That when goods taken on freight are damaged by a peril of the sea, and require some time to dry and reship them, the freight is not lost, is a well settled principle of maritime law. The shipowner has a lien upon the goods shipped, and is not bound to deliver them without payment of full freight. If such freight is paid, there is no loss on freight, and of course the insurer of that subject is discharged. If the shipowner volun-

tarily delivers them up, and the owner of the goods consents to receive them, which may be for the best interest of both; so if the owner of the goods, having notice, declines to interfere, and the master, as agent for both parties, and for their mutual interest, sells them, and they affirm such sale and claim the proceeds, as in the present case; in all these cases the freight on these goods is gone; but it is not lost by one of the perils insured against.

A few more direct authorities on this point are here stated. Where, upon a policy on freight of goods, part were wetted with sea, and could not be safely reshipped without drying, which would take six weeks, and the ship went on and left them, the freight was lost; but the insurers of freight were held not liable. *Mordy v. Jones*, 4 B. & C. 394, and 6 D. & R. 479. *Griswold v. New York Ins. Co.* 1 Johns. 204.

A similar point was decided by this court in the case of *M'Gaw v. Ocean Ins. Co.* 23 Pick. 405. In that case the ship could have been repaired seasonably, or the goods might have been forwarded in another, though not on terms which would have caused any saving of freight. They were sold by the master, and it was probably most for the interest both of the shipowners and shippers that they should be sold; but it was held, that for such loss of freight the insurer on freight was not liable.

But in the present case there was a loss of freight, to a considerable extent, by the jettison of part of the goods from which it would have accrued, on the voyage to the place of destination, and other goods absolutely lost. That jettison is a loss by perils of the sea, as well of freight as of goods, hardly needs authorities to support it. *Butler v. Wildman*, 3 B. & Ald. 398.

Nor is the owner of goods jettisoned bound to wait for the adjustment of the general average before calling on the underwriters on freight, and in the first instance to seek his indemnity from the other contributory interests; but he may proceed at once by action against his insurers; and if salvage is realized before the adjustment of the loss, by verdict or otherwise, it should be deducted, otherwise it will enure as salvage to the

Lord v. Neptune Insurance Company.

insurer.* *Maggrath v. Church*, 1 Caines, 215. *Watson v. Marine Ins. Co.* 7 Johns. 62. *Vandenhoevel v. United Ins. Co.* 1 Johns. 435. *Forbes v. Manufacturers' Ins. Co.* 1 Gray, 371.

It appearing, then, by the uncontested facts in the case, that a considerable part of these goods could have been forwarded by the same or another ship, by which freight could be earned; and this not having been done, but the goods sold by the master, acting as agent for the owners of the goods, upon considerations of expediency not affecting the underwriters, in consequence of which there was not an actual or complete total loss; and that it was not a loss of part, which could be made a technical total loss by abandonment, because no abandonment was in fact made, and because it was not a case where the assured could abandon; therefore the court are of opinion that the plaintiff cannot recover for a total loss; but his claims, whatever they are, must be determined by an adjustment as of a partial loss.

The foregoing is in substance the opinion delivered after the former argument. Upon revision, some additional views and illustrations have been stated, and some further authorities cited, in the hope of making it more intelligible.

This opinion having been drawn up and placed in the hands of the reporter, it thus came to the knowledge of some of the parties, whereupon the counsel for the plaintiff made an application to the court for a rehearing, on the ground that the case had not been fully understood, or that some omission or mistake had occurred; in consequence of which no judgment was entered. A rehearing was had, and we have greatly to regret that various circumstances have occurred to cause an unusual delay in bringing the case to a final result.

* The defendants, upon this point, relied on the following clause in the policy: "In case of loss, such loss shall be paid in sixty days after proof and adjustment thereof; the amount of the premium note, if unpaid, and all sums due to the company, from the insured, when such loss becomes due, being first deducted, and all sums coming due being first paid or secured to the satisfaction of the said president and directors, they discounting interest for anticipating payment."

On the rehearing, and in urging the plaintiff's claim for a total loss, the counsel for the plaintiff take a view of the facts in some respects perhaps different from the case as we understood it. We were governed by the main facts as they appeared on the agreed statement. It is true that the deposition of the mate, and some other written evidence, were referred to ; but we did not consider that the court were called on to decide contested facts, or draw inferences from evidence. And we have no occasion, it is believed, to refer to that evidence, because, in our view, not affecting any material fact bearing on the case. We considered the case as it appeared in the agreed statement.

It is now insisted, that by the agreed statement, it was agreed and conceded that all the wheat, which was the bulk of the cargo, except six hundred bags, was totally lost for the purpose of being carried to Havre and earning freight. If by "totally lost" the parties meant "physically destroyed," "annihilated," "ceased to exist *in specie*" or retain the character and name in which it was shipped, perhaps we might not have distinctly understood it as going to this extent. The principle we intended to state was, that if it had not ceased to exist *in specie*, though it might be greatly damaged so that upon arrival it would not be worth the sum payable for the freight, still the shipowner had earned his freight, the shipper was bound to pay it on delivery or tender of the damaged goods, the freight was not lost by a peril insured against, and the underwriter was not liable on his contract.

This was the precise point of view in which the facts were to be considered. If the parties intended to be understood that the great bulk of the wheat, in bags, could not have arrived at Havre *in specie*, as wheat — damaged wheat, it may be, sour, musty, incapable of beneficial use, but still wheat — all doubt and ambiguity would have been avoided by agreeing to this in explicit terms. In regard to some portion of the wheat, it was agreed that it could not have been so dried, separated and prepared as to have arrived *in specie*; but the plaintiff alleged that the expenses would have exceeded the value of the goods on arrival.

Lord v. Neptune Insurance Company.

Without going into details as to the part of the cargo wholly destroyed or more or less damaged, we were led to suppose that the parties did not, by this paragraph of the statement, mean to agree that the great bulk of the wheat was absolutely annihilated and destroyed; partly by a supposition that, from the nature of the article, wheat in bags, though wet and damaged, it might not wholly perish in a voyage across the Atlantic; and partly because the reduction in the value of the goods shipped, by the perils of the sea, so as on their arrival not to be worth the amount to be paid for their freight, has in some of the earlier cases been regarded as a test of the carrier's right to leave or sell them, and claim a total loss. If in fact it was understood and agreed that all the wheat except six hundred bags was so far injured by sea damage that it would cease to exist before arrival, it would have been easy to avoid all ambiguity by adding to the terms that it could not be restored so as to arrive at the port of destination, the words "*in specie*," or "as wheat," or some equivalent expression.

But however the fact was; or in whatever sense the parties intended to be understood, in the agreed statement of facts; or whether the court in any respect took a mistaken view of that statement, in its details; it will not vary the result to which we formerly came, that the plaintiff cannot recover for a total loss, and that whatever claims he has against the defendant company must be adjusted as a partial loss. A total loss of part of the freight insured is a partial loss. *Moss v. Smith*, 9 C. B. 94.

These different views of the facts may indeed make a great difference as to the amount that the plaintiff may be entitled to recover by the adjustment of a partial loss. It is an uncontested fact, that the vessel on her passage, after the policy on freight had attached to that cargo, on that voyage, was struck and over-set by a peril of the sea, and the wheat thereby became wet and damaged. Now, if that damage is found to have been immediately attended with incipient decay, and when landed it was in such progress of deterioration that it could not possibly reach Havre as wheat, but in the mean time would totally perish, it would follow, upon the principles hereinbefore stated, that it

was an entire loss of part of the merchandise, and so a loss of the freight to accrue upon carrying it safely. But this is a question of fact, to be carefully and fully considered in settling the items of a partial loss; and possibly the facts to be ascertained by the assessor, pursuant to the agreement of the parties, may throw some light on the subject.

In adjusting the loss of the plaintiff as a partial loss, the valuation of the freight in the policy, whether more or less than the freight actually chargeable on particular goods, is to be taken as the basis of computation; and every item of freight lost, and every item on which no loss of freight occurred, because the goods were voluntarily surrendered, is to be computed according to the proportion it bears to the whole freight as valued in the policy.

In consequence of the alternative view of the facts here alluded to, and in order to meet one view taken in the argument, it is proper to add that if it should turn out that goods yielding more than half the freight were wholly lost, and so more than half the freight lost, still it would not, in analogy to the case of goods lost or damaged to more than half their value, warrant an abandonment and a recovery for a total loss, had there in fact been an abandonment in the present case. Each item of loss was complete in itself, and no abandonment could enlarge or change it. For the reasons before given at large, there could be no abandonment, because there was nothing to abandon. Abandonment must be of the subject, or some portion or remnant of it. Here the subject was freight, and there was no freight, or claim to freight, actual or possible, which could enure to the underwriters by abandonment.

The loss then is to be adjusted as a partial loss, not because each item of which it is composed was not complete and total in itself, but because the entire aggregate of such absolute losses does not amount to the whole freight put at risk, and insured by and valued in the policy.

Case referred to an assessor.

CHARLES HEEBNER vs. EAGLE INSURANCE COMPANY OF CINCINNATI.

A policy of insurance on a ship against "total loss only," even if a time policy, covers a constructive total loss.

It is a sufficient abandonment of a ship injured by perils of the sea, and therefore surveyed and condemned on the west coast of the United States, in time of peace, to state in a notice to the underwriters that the assured "having received information of the condemnation of" the ship "at Humboldt, California, hereby abandons all in said vessel insured by" their policy "and claims as for a total loss."

A policy of insurance from an insurance company established in another state, signed by their president and secretary there, but not to be valid until countersigned by their agent here, and issued by such agent here, is to be interpreted by the law of Massachusetts; and one third new for old is therefore to be deducted in estimating a constructive total loss under it.

Under a policy of insurance upon a steamer, which exempts the insurers from liability for breaking of the machinery unless occasioned by stranding, the insurers, if the vessel is injured first by perils of the sea and afterwards by stranding, are liable only for so much of the injury as the assured prove to have been occasioned by the stranding.

In computing a constructive total loss on a vessel stranded on the west coast of the United States, an assessor allowed two months' interest on the funds raised for repairs. *Held*, that this assessment could not be increased by the court without evidence to overcome the assessor's report.

ACTION OF CONTRACT on a policy of insurance, numbered 105, and dated July 15th 1850, for \$5000 on the Steamer Chesapeake, valued at \$40,000, for one year from the 24th of May 1851, "to trade on the west coast of America, and the rivers of the west coast and the islands of the Pacific Ocean," against "total loss only," and containing a stipulation "that in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis for ascertaining her value shall be by her valuation in this policy, and if not valued herein, then her actual value at the port to which she belonged at the time of the inception of this risk."

The steamer sailed from San Francisco on the 24th of September 1851 for Humboldt Bay and other ports on the Pacific coast, and after meeting with severe injuries from perils of the sea, and making all possible repairs at intermediate ports, arrived on the 16th of October at Humboldt Bay, where her captain called a survey, which was made; and, at the request of

her captain, a shipmaster of San Francisco made an estimate of the repairs necessary to be done to make her seaworthy, which was based entirely upon the surveyor's report, and amounted to \$22,951, including the expenses of bringing men and materials from San Francisco.

Humboldt is a very small settlement, containing about thirty inhabitants, with no means of repairing vessels. By the travelled route it is between three and four hundred miles distant from San Francisco, where repairs could have been done at from twenty to twenty five per cent. less. One of the surveyors testified that the steamer was not in a condition to go with safety to San Francisco.

In compliance with the report of the surveyors, the steamer was sold by auction at Bucksport, in Humboldt Bay, about the 1st of November, for \$2175. Written notices of the sale were posted up in all the towns around the bay. There were from twenty to thirty persons present at the sale.

On the 6th of February 1852 the assured signed and addressed to the agent of the defendants at Boston the following letter: "Having received information of the condemnation of the Steamer Chesapeake at Humboldt, California, I hereby abandon all in said vessel insured by policy of the Eagle Insurance Company of Cincinnati, No. 105, dated July 15, 1850, for \$5000; and claim as for a total loss."

The parties agreed that if the court should be of opinion that "under this policy and the facts stated, the plaintiff could recover for a constructive total loss, the case is to be sent to an assessor, to ascertain whether the actual cost of repairs would exceed half the valuation, so as to create a liability therefor on the part of the defendants, and the amount for which judgment should be rendered against them; otherwise, the plaintiff is to become nonsuit." Upon this statement the case was argued at November term 1855.

G. S. Hillard, for the plaintiff.

F. C. Loring, for the defendants. 1. By the terms of this policy the standard of value is the valuation in the policy, and this accords with the law of this state. *Deblois v. Ocean Ins.*

Co. 16 Pick. 303. Under a policy against total loss only, the insurer is not liable for a constructive total loss by reason of damage exceeding fifty per cent. of the value of the ship, and which is in fact only a partial loss, though it may be turned into a total loss by the election of the assured to make an abandonment. *Smith v. Manufacturers' Ins. Co.* 7 Met. 448. If the assured had elected to repair, the insurers clearly would not have been liable under this policy, whether the extent of the repairs was less or more than fifty per cent. The liability of the insurer cannot be entirely at the election of the assured. Insurance against "total loss only" is the same as "warranted free from average or partial loss." An insurance on a cargo "against total loss" or "free from average" does not cover a constructive total loss. 2 Phil. Ins. (3d. ed.) §§ 1615, 1767. *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39. *Moreau v. United States Ins. Co.* 1 Wheat. 219. By analogy the same rule must apply to vessels where the damage is less than the value of the vessel. This question was decided by this court many years ago, and the decision has not been questioned since. *Murray v. Hatch*, 6 Mass. 465. *Buchanan v. Ocean Ins. Co.* 6 Cow. 331.

2. The letter of abandonment is defective, in form and substance; because it states no reasons for abandonment, except that the vessel has been condemned; and neither states the grounds of condemnation, nor gives the insurers any means of ascertaining them. *Peirce v. Ocean Ins. Co.* 18 Pick. 83. *Bullard v. Roger Williams Ins. Co.* 1 Curt. C. C. 152. *Macy v. Whaling Ins. Co.* 9 Met. 359. *Suydam v. Marine Ins. Co.* 1 Johns. 181. 2 Phil. Ins. §§ 1681, 1684.

SHAW, C. J. Two questions are presented; first, whether the plaintiff can recover for a constructive total loss; and second, whether the plaintiff gave a seasonable and sufficient notice of abandonment.

1. The first question is, whether, under this policy, the defendants are liable for a constructive total loss, caused by the perils insured against, to more than half the value of the vessel.

The natural and grammatical construction of the language, "liable for a total loss only," is, any total loss, as that term is

known and understood by those conversant with the practice and law of insurance. The distinction between an actual and constructive total loss is well known and understood; and if the parties intended to qualify it, and limit the liability to either particular species of total loss, we think they would so have expressed it. But there is nothing in the policy to indicate that the insurers are not to be liable for a constructive total loss, if perfected as such by an abandonment; and we see nothing in the principles of the law of insurance, from which such a distinction can be implied against the letter of the contract.

The leading authority relied on is that of *Murray v. Hatch*, 6 Mass. 465. It is observable that that was an insurance on vessel, cargo and freight, and against a total loss only. The vessel remained *in specie*, capable of being repaired, a few days' sail from the United States, and there was no abandonment. The case was argued and considered on the assumption that there was no abandonment; but the plaintiff insisted that, upon the facts then appearing, there was a total loss without abandonment. There was no adjudication, therefore, upon the proposition that, in an insurance on vessel against total loss only, proof of a constructive total loss will not sustain the action. It is admitted by the eminent judge who gave the opinion, Mr. Justice Sewall, that no precedent like it had been cited; but his reasoning is founded upon the supposed analogy between the restriction in this policy and the cases of exceptions and warranties against particular averages and partial losses on certain goods, as illustrated by reference to the case of perishable articles, embraced in the common memorandum, being excepted from liability for losses on account of sea damage. These exceptions are manifestly founded on the impossibility or extreme difficulty of distinguishing, in the memorandum articles, damage arising from sea perils, and that arising from the natural tendency of the articles themselves to natural decay or deterioration. All the cases cited are those of perishable goods, whence he draws the conclusion that in cases arising under exceptions of particular average, or warranty against partial losses, the insurer is liable only for a total loss, where the sub-

Heebner v. Eagle Insurance Company of Cincinnati.

ject matter of the insurance is absolutely destroyed. The opinion is there expressed that where the policy is limited, as in that case, to be upon the risk of a total loss only, the same principles must govern the decision. The reasoning upon the evidence there goes to show that the vessel remained *in specie*, was capable of being repaired, and according to one statement might have been repaired for less than half her value as expressed in the policy, and the court decide that the evidence did not prove an actual total loss. There was also a sufficient reason for setting aside the verdict of the jury and ordering a new trial, that in finding for the plaintiff for a total loss, they had not deducted the salvage held by the plaintiff.

This case was no doubt decided right, because the assured had not complied with the indispensable condition of fixing a constructive total loss, where the loss was not absolutely total in its nature, by a seasonable abandonment. This case was cited in the case of *Buchanan v. Ocean Ins. Co.* 6 Cow. 331; but that was a case where the court had first decided that the plaintiff had no insurable interest, and where of course nothing would have passed to the underwriter by an abandonment. And the point was not necessary to the decision of the case then before the court.

The distinction between damage to goods to more than half their value, and damage to a vessel to more than half her value, as giving a right to abandon, and laying the foundation for a constructive total loss, is well illustrated by the case of *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39. There it was held, that where a constructive total loss is sought to be maintained, upon the ground of deterioration of the cargo, by some of the perils insured against, to more than half its value, all deteriorations of memorandum articles are to be excluded from the estimate of damages; and that, in order to establish such a constructive total loss, damage from the perils insured against must be found to have been sustained by the residue of the cargo, as if the whole of the memorandum articles were sound, to warrant an abandonment. This construction is obviously necessary to carry out the rule that the insurers are to be exempted from

all losses on memorandum articles, unless of a general nature specified, as by capture or stranding; and is plainly founded on the impracticability of proving whether the damage found in these perishable goods be attributable to perils of the sea, or to internal causes.

But we think this case establishes the principle that damage to more than half the value by sea perils to goods not in the memorandum, and *a fortiori* damage to a ship by perils of the sea to a like amount, does amount to a constructive total loss, and at the election of the assured, by a regular abandonment, becomes a legal total loss. That the distinction is limited to memorandum articles seems to be recognized in *Moreau v. United States Ins. Co.* 1 Wheat. 219, and the cases there cited and referred to.

There seems to be no reason in the nature of the contract, or of the business to which it refers, why the liability of the insurers should not extend as well to a constructive, as to an actual, total loss. It is true that no voyage is lost or defeated, because no voyage was in contemplation, it being a policy on time; but by the perils insured against, all further navigation of the vessel was defeated and put an end to, the whole purpose of the enterprise, that of employing the vessel in profitable navigation during the year, was defeated. The court are therefore of opinion that under this policy the defendants were liable for a constructive total loss by the perils insured against, if followed by a legal abandonment.

2. The next question turns upon the form, legal effect and sufficiency of the notice of abandonment.

It appears by the evidence that the vessel was damaged by the violence of the sea and stress of weather, and was at a small port on the western coast of America, and the evidence tended to show that, if she could be repaired there, the expense of such repairs, after making the customary and stipulated deductions, would amount to more than half her value as expressed in the policy. Damage of a vessel to more than half her value, as a ground of abandonment and constructive total loss, seems now to be settled as the rule of American law, conformably to

that of some of the maritime states of Europe, contrary to the English rule, which requires proof of damage to such an extent that the repairs of the vessel in the place where it is would be equal in amount to the value of the vessel when repaired. *Marcadier v. Chesapeake Ins. Co.* 8 Cranch, 39. The master called a survey, and, in compliance with the report of the surveyors, sold the steamer at auction at Humboldt Bay. These things occurred early in November 1851; and on the 6th of February following notice of abandonment was given by letter by the plaintiff to the agent of the defendants, residing in Boston. In deciding on the character of this notice, we are to consider the relative situation of the parties, what they respectively knew and understood, and what was the subject matter of the communication.

The Chesapeake was a steamer, owned by the plaintiff, insured by the defendants about six months before, for no voyage to be made from one port or another to carry any particular cargo, but for the term of one year, at all ports and places, with the general purpose to trade on the west coast of America, insured against total loss only. The vessel was at a great distance from her home port by sea, but the communication by letter, by way of the Isthmus of Panama, was between one and two months.

The notice and offer of abandonment is certainly brief, and in a form not to be recommended; still the question is, whether it is sufficient. The difficulty lies in the ambiguity of the word "condemnation," as a cause of loss, accompanied by a demand for a total loss. The term, in its application to the subject matter, may import a hostile capture, and condemnation consequent thereon, but it may also mean that the vessel has been condemned as innavigable, as incapable of keeping the sea, on account of damage, and so declared by persons of competent authority. In several insurance cases, referred to in the course of this discussion for other purposes, we have seen the phrase, after describing the shattered condition of a vessel, "she was condemned to be sold." We are then brought to the question how it was used in the present case, what did the writer mean

in using it, and how was it understood by the agents and officers of the company.

It was a time of profound peace; the place was Humboldt Bay, on the west coast, described as in California, and of course within the limits and jurisdiction of the United States. The idea of capture and judicial condemnation as prize could hardly have arisen in the mind of the agent to whom this notice was addressed; and it is quite manifest that it was not so used by the writer. Under the circumstances therefore it must have been naturally understood that the vessel had been condemned as unfit for further purposes of navigation, according to the actual state of facts. Besides, it was not a positive assertion of the fact, but only "information," of course by letter; and if the company were actually in doubt, or desired fuller intelligence on the subject, it was only to ask for the letter, or other source of the information. It did not, and had no tendency to, mislead the company by stating one cause of loss, and afterwards attempting to recover by proof of loss from a different cause.

It was an explicit transfer and relinquishment of all the assured's right and interest in the vessel, in the proceeds if rightfully sold, and in any and all salvage which had been or could be obtained. In this respect it differs essentially from the case of *Peirce v. Ocean Ins. Co.* 18 Pick. 83, in which the abandonment was held insufficient, because it was a mere notice to the company of the state of the vessel, and did not by any of its terms relinquish, transfer and abandon claims for the proceeds of the vessel from the time of the loss, or other claims for salvage. The remarks made in giving the opinion in that case are made in reference to the subject matter and circumstances of the case.

A subsequent case, more analogous to the present, came before this court, and the question of the sufficiency of the notice of abandonment was fully considered. *Macy v. Whaling Ins. Co.* 9 Met. 354. The insurance was upon cargo, but the notice of abandonment was only that the ship was lost. But the court held that, under the circumstances, being a whaling ship, the loss of the cargo might well have been understood from the loss

of the ship; and the plaintiffs having in form abandoned their interest in the cargo insured by the defendants, the abandonment was not rendered invalid by the informality in the notice. And in another clause the court say, where the insured makes his abandonment and claims for a total loss, under the policy, without stating the cause of loss, but refers to the intelligence he has received, the abandonment will not be defective, because the underwriter can call for the information on which it is grounded.

No form of abandonment is established either by law or the usage of this branch of business. Any form therefore, which gives the underwriters information of the nature of the loss by one of the perils insured against, and of the readiness of the assured to abandon all rights, interests and claims to the subject of the insurance, and the avails and proceeds thereof, is sufficient. In the present case, the assured, in their notice and offer of abandonment, by referring to their information of a fact which might have been caused by one of the perils insured against, and which the assured claimed was in fact so, by an explicit relinquishment of all rights to the vessel and the proceeds thereof, and all salvage, and by a demand for a total loss, gave the defendants notice or the means of knowing the nature and particulars of the loss as it actually existed; and as the company signified no desire to be put into possession of the information, the court are of opinion that the notice was sufficient.

Case referred to an assessor.

The assessor reported the amount of the loss as \$18,638.31. The plaintiff excepted to his report in the following particulars:

1. "The defendants were a corporation established at Cincinnati in the state of Ohio. At the time the insurance was effected the plaintiff resided in Philadelphia, and employed a broker in Boston to procure this insurance. The defendants had an agent there duly authorized to make insurance contracts, who was furnished with blank policies, signed by the officers of the company, in which it was declared that they should not take effect until

countersigned by said agent. The contract was made, and the policy filled up, signed and delivered, in Boston. The policy did not contain the clause, common in Boston policies, that the insured may not abandon in case of damage, unless the amount made up as a partial loss should exceed one half of the valuation."

The plaintiff contended that the rule of a deduction of one third new for old, in cases of total loss, was peculiar to this commonwealth, and was therefore not applicable to this case. But the assessor refused to adopt this view.

2. In the face of the policy this clause was written: "It is understood that this company is not liable for any derangement or breakage of the machinery or bursting of the boilers, unless occasioned by stranding."

The only evidence upon this point was the following testimony of the captain: "The steamer did meet with an accident after leaving Umpqua and crossing the bar. She was struck on the starboard bow by a very heavy sea, giving the vessel stern way, and, the helm being hard-a-port, broke both of the rudder pintles, stove two boats and the bulwarks and stanchions, and did a great deal of injury to the engine and cabin, and ruined most of the stores. Had no cargo in at the time. After the rudder was carried away, the vessel was steered by the propellers, as well as we could, by backing on one and going ahead on the other; they being nearly useless, having been badly strained by the sea that struck the vessel. By this means, managed to keep off shore during the night. The wind becoming a little more fair the next day, made all possible sail for Port Orford. We left Port Orford on the 10th of October for Trinidad, and arrived there on the 12th. There being a very heavy swell heaving into Trinidad Bay, she dragged her moorings and struck on the rocks, remaining there from half to three quarters of an hour, striking heavily, breaking two of her planks, and otherwise straining her, and making her leak worse. We immediately got out a kedge and kedged her off, and found that she leaked worse than before."

The assessor's conclusion on this point was as follows: "It

may be fairly inferred from the evidence, that some damage was done to the machinery by the stranding ; but it is equally clear, I think, that the substantial injury, both to the hull and machinery was occasioned by the heavy sea by which the vessel was struck after leaving Umpqua. As the evidence stands, any estimate of the amount of damage done to the machinery by the stranding must be to a great degree a matter of conjecture. I think that it will be going quite as far as, if not beyond, what the evidence will warrant, to estimate the damage thus occasioned as one fourth of the total amount of damage sustained by the machinery."

3. "The plaintiff claimed to add the cost of raising funds in California to meet the necessary repairs, at five per cent. per month for three months, the time necessary for meeting drafts on the east. The defendants objected to this item, on the ground, that, as the steamer was insured to trade on the west coast of America, she must be considered as having been at a home port, and the owners were bound to be provided with all necessary funds there.

"Humboldt Bay, where the steamer lay, and where the repairs must have been made, if at all, as the steamer was not in a condition to be removed, was a small settlement of twenty or thirty persons, about five hundred miles from San Francisco. The plaintiff then resided in Philadelphia, and the captain, who was the other part-owner, at San Francisco. Neither of them had any funds at Humboldt Bay, nor in San Francisco, except a small sum which the plaintiff had there in the hands of an agent, the proceeds of some goods sold on commission. The plaintiff was a man of large property, and in good credit at home, and the captain's means were very limited. The cost of raising the necessary funds at Humboldt Bay, or at San Francisco, would have been at least five per cent. per month."

"The charge of five per cent. per month, for two months, making ten per cent. on the amount necessarily expended, seems reasonable and is allowed."

The exceptions to the assessor's report were argued and decided at March term 1859.

Hillard, for the plaintiff. 1. The contract of insurance is a contract of indemnity, and is to be construed in such manner, if possible, as to give it effect. The Massachusetts rule of deducting one third new for old should not be applied to this case. The place of the contract is Ohio, and not Massachusetts. In the absence of any rule peculiar to Ohio, the rule of the supreme court of the United States should be applied. Story Conf. §§ 293 *b*, 299, 300 *b*, 301. *Chapman v. Robertson*, 6 Paige, 630. *Hyde v. Goodnow*, 3 Comst. 266. *Robinson v. Commercial Ins. Co.* 3 Sumner, 220. *Bradlie v. Maryland Ins. Co.* 12 Pet. 399. This policy has not the clause — that the insured may not abandon in case of damage, unless the amount made up as a partial loss should exceed one half of the valuation — introduced into the Boston policies since the case of *Peele v. Merchants' Ins. Co.* 3 Mason, 27. *Wood v. Lincoln & Kennebeck Ins. Co.* 6 Mass. 479. *Hall v. Franklin Ins. Co.* 9 Pick. 466. *Sewall v. United States Ins. Co.* 11 Pick. 90. *Winn v. Columbian Ins. Co.* 12 Pick. 278. *Deblois v. Ocean Ins. Co.* 16 Pick. 303. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 456. *Reynolds v. Ocean Ins. Co.* 22 Pick. 191.

2. The assessor's apportionment or distribution of the damage to the machinery is arbitrary and conjectural, not warranted by the probabilities of the case, nor justified by the rules of evidence. For the plaintiff to show how much of the damage was caused by the stranding is practically an impossibility. But the plaintiff shows an injury by a stroke of the sea and an injury by stranding; the burden of proof then shifts to the defendants; they have an affirmative proposition to maintain, to wit, that a certain proportion of the damage was done by the stroke of the sea; and the plaintiff is entitled to the benefit of a doubt. *Gray v. Gardner*, 17 Mass. 188. *Attleborough v. Middleborough*, 10 Pick. 378. *Powers v. Russell*, 13 Pick. 76. Exceptions of risk are to be taken most strongly against the insurer, for whose benefit they are intended. *Palmer v. Warren Ins. Co.* 1 Story R. 360. *Donnell v. Columbian Ins. Co.* 2 Sumner, 366. *Blackett v. Royal Exchange Assurance Co.* 2 Cr. & J. 244.

3. The plaintiff excepts to that portion of the assessor's report

which allows only two months' interest on the sum necessary to be raised. Three months' interest at least should be allowed, considering the remoteness of Humboldt Bay, and that it is geographically, though not politically, a foreign port.

Loring, for the defendants.

BIGELOW, J. 1. The contract of insurance was finally executed and delivered in this state. It was therefore a contract made here, and the law of this state is to govern its construction and interpretation, without any reference to the domicile of the corporation liable upon it. *Kennebec Co. v. Augusta Ins. & Banking Co.* 6 Gray, 208. By the well settled rule of law in this commonwealth, applicable to policies of insurance, where an injury is sustained by a vessel, the loss is not total unless the expense of repairs exceed fifty per cent. of the valuation in the policy, after the deduction of one third new for old. *Deblois v. Ocean Ins. Co.* 16 Pick. 314. On this point the report of the assessor is confirmed.

2. The sum allowed by the assessor for injury to the machinery is quite as large as the proof before him would warrant. The burden was on the plaintiff to establish the amount of his loss; and if two perils operated to cause an injury to the vessel, for one of which the insurers were liable, and from the other of which they were exempt, it was for the plaintiff to show definitely the amount of loss sustained by the peril insured against.

3. There are no facts in the assessor's report from which we can infer that any greater amount should have been allowed for interest on the sum raised to repair the vessel. *Orrok v. Commonwealth Ins. Co.* 21 Pick. 469. As the presumption is in favor of his finding, in the absence of countervailing proof, his report on this point must stand.

The result is, that the plaintiff's exceptions to the assessor's report are overruled, and he fails to show a constructive total loss, and cannot recover in this action.

Judgment for the defendants.

Kettell & others v. Alliance Insurance Company.

JOHN B. KETTELL & others vs. ALLIANCE INSURANCE COMPANY

Under an open policy of insurance in common form, containing the usual memorandum clause, and also this clause, "partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates is excepted," the insurers are liable for a constructive total loss of tin plates; and if a number of boxes of tin plates, shipped and valued as one parcel, is damaged by the stranding of the ship, carried to the nearest market and there sold for less than half its valuation in the policy, deducting the necessary expenses of the transportation and sale, and duly abandoned it is a constructive total loss.

ACTION OF CONTRACT on an open policy of insurance for \$25,000 at a nominal premium "on property on board any vessel or vessels to, at and from ports or places, per indorsements." Among the indorsements was this: "February 21, 1854. \$4850. Rate 1½. Premium \$84.87. Ship Charles Humberston, from Liverpool to Boston."

The policy was in the common Boston form, against perils of the sea and other perils: "Provided that the insurers shall not be liable for any partial loss on hemp and flax, unless the loss amount to twenty per cent. on the whole aggregate value of such articles; nor for any partial loss on sugar, flaxseed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding; nor for any partial loss on other goods or on the vessel or freight, unless it amount to five per cent.; exclusive, in each case, of all charges and expenses incurred for the purpose of ascertaining and proving the loss; but the owners of such goods shall recover on a general average. It is further agreed, that the insurers shall not be liable for damage or injury to goods by dampness, change of flavor or being spotted, discolored or mouldy, unless the same be caused by actual contact of sea water with the articles so damaged; and that the company shall not be answerable for loss or damage, by wet or exposure to the elements, of goods insured as on deck. In

case of damage, by perils of the sea, to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise, as far as practicable." At the end of the last paragraph of the policy, next before the formal conclusion, were printed these words: "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates, is excepted."

Bigelow, J., before whom the trial was commenced, reserved the case for the decision of the full court, upon a report of which the material parts were as follows:

The shipment in question consisted of five hundred boxes of tin plates, invoiced and valued together at one sum. The *Charles Humberston*, with the tin plates on board, sailed from Liverpool for Boston on the 1st of March 1854, and was wrecked in Dundrum Bay, on the north coast of Ireland, one hundred and fifty miles from Liverpool. The bottom of the vessel was stove in, so that she filled with water, and the tide flowed freely in and out of her, and she finally went to pieces. The salt water got into all the boxes, and damaged all the plates more or less; some of them were wholly destroyed; and the others, after having been exposed for some weeks to the action of the salt water, were taken out of the ship, carried back to Liverpool, there surveyed, and, "in consequence of their damaged and perishing state," recommended by the surveyors to be immediately sold, and were sold by public auction for whom it might concern. It was for the interest of all concerned that they should be sold at Liverpool. The accounts of sale showed that the proceeds of the sales, deducting the expenses of raising the tin and sending it to Liverpool, were less than half the value of the shipment, but more than half without such deduction.

The plaintiffs introduced several depositions tending to show that the effect of the salt water was to utterly spoil the plates for use as bright tin ware, though they might have been japanned. And there was conflicting evidence upon the question whether, if the tin had been reshipped from Liverpool to Boston, the

Kettell & others v. Alliance Insurance Company.

expenses of the reshipment would have exceeded the sum for which it would have been sold upon arrival in Boston.

The plaintiffs made a seasonable abandonment, and claimed a right to recover as for a total loss.

This case was argued before the first decision in the next preceding case of *Heebner v. Eagle Ins. Co. ante*, 133.

R. Fletcher, for the plaintiffs. As the loss was more than five per cent., the defendants, under the general enumeration of risks and the memorandum clause, are clearly liable for the loss claimed, whether the goods are regarded as perishable in their nature or not. The expenses are to be deducted in estimating whether the loss exceeded fifty per cent. 2 Phil. Ins. § 1732.

The last clause in the policy — “Partial loss on sheet iron, iron wire, brazier’s rods, iron hoops and tin plates excepted” — is imperfect, unmeaning and nugatory. It does not show whether these articles are excepted from the classes of partial losses for which the defendants are liable, or from those for which they are not liable. If it is to be understood as meaning that the underwriters shall not be liable for any partial loss on tin plates and other articles specified, it is nugatory and void, as being repugnant to the express previous undertaking to be liable for such a partial loss if amounting to five per cent. 2 Parsons on Con. 20 note, 26.

But if this clause is equivalent to the insertion in the memorandum clause of the words “provided that the insurers shall not be liable for any partial loss on tin plates,” still the property insured having been damaged by perils of the sea, and never reached its destination, but been justifiably sold at Liverpool, and the actual loss being more than fifty per cent., the plaintiffs, on abandoning, were entitled by the general principles of the law of insurance to recover for a total loss. 2 Phil. Ins. § 1623.

Upon the question, what constitutes a total loss under the memorandum clause, “the adjudged cases present so much discrepancy, as to leave it to the discretion of judges to adopt the doctrine that may seem most consistent with general principles.” 2 Phil. Ins. § 1767. Those decisions, which hold that there must be an actual total destruction of memorandum

articles, in order to make the insurers liable, rest entirely upon the authority of the *dictum* of Lord Mansfield in *Cocking v. Frazer*, Marsh Ins. (3d ed.) 219, and Park. Ins. (7th ed.) 181, and not upon any discussion of principles. *Dyson v. Rowcroft*, 3 Bos. & Pul. 474. *Burnett v. Kensington*, 7 T. R. 222. *Le Roy v. Gouverneur*, 1 Johns. Cas. 226. *Maggrath v. Church*, 1 Caines, 196. *Biays v. Chesapeake Ins. Co.* 7 Cranch, 415. *Marcardier v. Chesapeake Ins. Co.* 8 Cranch, 39. *Moreau v. United States Ins. Co.* 1 Wheat. 219. *Brooke v. Louisiana Ins. Co.* 17 Martin, 530. *Wadsworth v. Pacific Ins. Co.* 4 Wend. 33. *Robinson v. Commonwealth Ins. Co.* 3 Sumner, 220. *Hugg v. Augusta Ins. & Banking Co.* 7 How. 595. That doctrine is no longer law in England. *Roux v. Salvador*, 3 Bing. N. C. 266. 2 Arnould on Ins. §§ 317, 318. It has been rejected in the only American case which has been discussed and decided on principle. *Poole v. Protection Ins. Co.* 14 Conn. 47. And it is inconsistent with the decisions of this court that a cargo of a memorandum article, as well as one of any other article, may be abandoned for a loss of the voyage. *Richardson v. Maine Ins. Co.* 6 Mass. 119. *Murray v. Hatch*, 6 Mass. 465. See also *Tudor v. New England Mutual Marine Ins. Co.* 12 Cush. 554.

The memorandum clause properly relates only to articles perishable in their nature, and was adopted to obviate the difficulty of determining whether the injury occurred from external causes or from the perishable nature of the articles insured. The decisions upon that clause do not apply to this case. To hold that there must be a total destruction of sheet iron, iron wire, brazier's rods, iron hoops and tin plates, would make the policy of no value to the assured. It cannot have that construction unless limited to "total loss by the absolute destruction of the property," as in *Guerlain v. Columbian Ins. Co.* 7 Johns. 527.

The goods were so damaged by the direct operation of the perils insured against, that they could not have been brought to Boston so as to be there of any value as the sort of article and fit for the use of such an article as was shipped; they would not have been worth there more than the freight and charges, and could be made of value only by japanning them and thus

Kettell & others v. Alliance Insurance Company.

making them a new article; each of which entitles the plaintiffs to abandon and claim for a total loss.

The ship was stranded and wholly lost, the voyage broken up, and the tin plates for a time wholly submerged, and never reached their place of destination or came to the hands of the assured, but were at least constructively destroyed, so that the assured might abandon and claim for a total loss. 2 Phil. Ins. §§ 1527, 1607.

F. C. Loring, for the defendants. Here was no actual total loss. Under an insurance against total loss only, insurers are not liable for a constructive total loss by damage. *Murray v. Hatch*, 6 Mass. 465. 2 Phil. Ins. § 1767.

The English law is said not to recognize any distinction as to totality of loss between goods free and goods not free from average. *Roux v. Salvador*, 3 Bing. N. C. 266, by Lord Abinger. 2 Arnould on Ins. § 318. Yet see Tindal, C. J., in *Roux v. Salvador*, 1 Bing. N. C. 526. That may well be; for by that law there is no constructive total loss, under a common policy, where the goods can be made to arrive at the port of destination so as to be of value there, or the ship can be repaired at a cost less than her whole value. But the same rule cannot apply in this country where, in an ordinary case, if the damage to ship or cargo exceeds fifty per centum — that is, if the loss is not really total, but partial and beyond a certain amount — the owner has the right to abandon the subject, if he chooses to do so, and to claim payment as for a total loss; not because the thing is really lost, but because the damage to it exceeds a certain amount of its value.

Loss by damage is necessarily partial so long as the subject continues to exist *in specie* and in value. In some cases, known as constructive total losses, the loss is, for the time being, actually total; if it continues so, the owner may recover without an abandonment, the insurer becoming subrogated to his rights. But it is never so in respect to what is called a constructive total loss by reason of damage. Where partial loss is excepted, the contract is that the insurer will pay if the thing is destroyed or the owner deprived of it by a peril, but that he shall not be

called upon to make good a diminution in value by mere damage. To hold an insurer liable in such case would be unjust, because his liability to pay anything would be made to depend on the will of the assured and the state of the market.

It is settled beyond controversy in this country, that where goods are insured "free from damage" or "partial loss excepted," the insurer is not liable for a constructive total loss by damage. 2 Phil. Ins. § 1767. *Hugg v. Augusta Ins. & Banking Co.* 7 How. 595. *Lord v. Neptune Ins. Co. ante*, 109. *Aranzamendi v. Louisiana Ins. Co.* 2 Louisiana, 432. *Skinner v. Western Marine & Fire Ins. Co.* 19 Louisiana, 273. *Depeyster v. Sun Mutual Ins. Co.* 17 Barb. 306. *Williams v. Kennebeck Mutual Ins. Co.* 31 Maine, 455.

The criterion to determine whether a total loss exists, where the insurance is "free from partial loss" and the loss arises from damage, seems to be whether an abandonment is essential to create a liability for a total loss; if it is, then the loss is constructively, not actually, total, and the insurer is not liable. When the insurance is on a vessel against total loss only, and she is damaged so badly that the expense of repairs will exceed her value when repaired, that is an actual total loss; no abandonment is necessary, and the insurer is liable. But if the damage only amounts to fifty per cent., the loss is only partial; an abandonment is essential, and the insurer against total loss only is not liable. *Bullard v. Roger Williams Ins. Co.* 1 Curt. C. C. 148. *Smith v. Manufacturers Ins. Co.* 7 Met. 452. And the same test must be applied to insurance on cargo; if it can be made to arrive *in specie* and of value, the loss is not actually total, an abandonment is necessary to make it constructively total, and the insurer "free from average" is not liable.

The facts of this case do not show an actual total loss, even under the most modern English rule, by which, if the goods are actually destroyed in value, or it is impracticable to send them on, because the expense of doing so would exceed the value at the port of destination, it is an actual loss, though the goods might be made to arrive *in specie*. *Roux v. Salvador*, 3 Bing. N. C. 266. *Rosetto v. Gurney*, 11 C. B. 176. And that rule

seems to be opposed to the American doctrine. *Hugg v. Augusta Ins. & Banking Co.*, and *Lord v. Neptune Ins. Co.*, above cited.

Besides, the plates were sold in Liverpool for more than their actual cost; and the sale not being necessary, but only expedient for the benefit of the owner, he must bear the expenses.

Tin plates, though very susceptible of damage, are not perishable in their own nature, like fruits, vegetables, beef, or the like. So long as they continue in existence, they must retain their identity.

SHAW, C. J. [After stating the other facts.] It appears by the accounts of the sales of the tin, that the net proceeds, after deducting the necessary costs and expenses of raising and sending them to Liverpool and the costs of sale, were less than half of the value of the shipment, though the gross sales without such deduction would exceed half the value. But the court are of opinion that the costs and charges ought to be thus deducted. The property would probably bring little or nothing, as taken from the ship on the coast of Ireland; it must be taken to a market; the expenses of such transportation and of the sales at Liverpool were a necessary diminution of the value, and, as such, reduced it to a sum less than half the value of the shipment. All the boxes of tin were alike submerged and lay some time in the salt water, by means of which the tin plates were more or less tarnished and damaged; none of the boxes escaped entirely dry, and some were entirely broken and lost. We have not found it necessary to determine the question of fact, upon which the depositions were conflicting, whether, if the plates had been reshipped from Liverpool to Boston, their original destination, the cost of such transportation would have exceeded the value of the tin upon arrival.

The first question raised in this case is respecting the true construction of this exception, contained in a printed line in the very last clause in the body of the policy, without context to explain or give it effect. "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates, is excepted." It is contended that as it stands it is senseless and void for uncertainty. The sentence is certainly elliptical

and abbreviated to the fewest possible words, and so is obscure, as a new clause crowded into an old printed form is likely to be, having neither preamble nor recital to introduce it. But we think that the meaning cannot be mistaken. The main purpose of the whole contract was for one party to insure the other against certain maritime losses, some designated as total and some as partial. It is not repugnant, in the sense in which a clause is contradictory and so void for repugnancy; where a proposition is expressed in general terms, and in the same writing are other clauses limiting or qualifying the generality of this proposition, or excepting something out of it, though not in the same sentence, yet in the same instrument and going into operation at the same time, both may well stand together and have their full force, as if the words of qualification or exception were in immediate connection with the proposition. We can have no doubt that by the true construction of this clause the insurers were not to be liable for loss on tin plates, unless such loss, estimated according to the rules and usages of Boston, should amount to a total loss. It is somewhat like the provision in regard to goods perishable in their own nature, enumerated in another part of the policy. But it differs in one respect; those articles are not absolutely exempted, but the underwriter is liable for a partial loss, in case it be occasioned by the stranding of the vessel, and exceed seven per cent. It is manifest therefore, that if this exception had come under the memorandum clause, the plaintiff would have been entitled to recover, because it is manifest from the uncontested facts of the case, that this vessel was lost by stranding, and the damage to the goods was occasioned thereby and did greatly exceed seven per cent.

What then is the extent of this exception? The natural construction is, that it leaves the insurer liable for all total losses; but it makes no distinction between absolute and constructive total losses; and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature. The clause in the contract gives no intimation that it is any particular kind of total loss, whether absolute or technical; it simply excludes

all kind of liability for a partial loss. By the natural construction of these provisions, it would seem that if the goods insured were placed by one of the perils insured against in that situation in which the assured has a right to abandon, and he does abandon, he has sustained a total loss, not within the exception.

But it has been argued that a constructive total loss is not within the exception, but that it must be an actual loss or destruction of the thing to take the case out of the operation of the exception and render the underwriter liable as for a total loss. This is maintained as resulting from a series of decisions, as a well established principle of insurance law. It is not indeed insisted or claimed that there is any such rule, or any judicial decision to such effect, upon this special, unqualified exception of liability for partial loss on commodities of iron, brass and tin; but the argument is, that there is a strict analogy between this exception and the common one applicable to memorandum articles "warranted free of average, unless general, or the ship be stranded," that the rule applicable to the one must include the other, and in case of such qualified exception there must be proof of an absolute total loss to take it out of the exception.

There is certainly a distinction of a practical character between these excepted articles and the memorandum articles which are subject to a limited and qualified exception. The exception is of sheet iron, iron wire, brazier's rods, iron hoops, tin plates, articles liable to be tarnished, corroded and damaged by contact with sea water to almost the whole extent of their commercial value, but indestructible in their nature. One reason given why a constructive total loss should not be made up of damage on memorandum articles, so as to allow of an abandonment for damage, was that in case of mere damage it was so difficult to distinguish between that part of the visible damage which proceeds from internal tendency to decay, and that part from perils of the sea, that it must have been the intention of the contracting parties to exclude it altogether. In this respect there is a marked difference between tin and brass goods liable to tarnish, and memorandum articles liable to decay. Another clause in the policy guards the insurer against loss by dampness

or other indirect damage to goods, not caused by actual contact of sea water with the articles damaged. So that it is only when these polished but indestructible articles come into actual contact with sea water, and that by stranding or some one of the perils of the sea insured against, that the underwriter can become liable at all; and a loss of this character can in general be ascertained with as much certainty as a similar loss to dry goods, hardware, or other merchandise not perishable in its nature.

It seems a little singular that upon the construction of this special exemption of tin plates and other metal goods liable to tarnish by sea water, there is no judicial decision; none was referred to in the argument, and we have no reference to it in any of the cases, except perhaps where, in a few instances, they are simply enumerated with other memorandum articles. We say nothing now of a case where there is a specific insurance on goods, and they arrive at the port of destination *in specie*, but having sustained damage by a peril insured against to an amount exceeding half their value. It would seem more consistent with the principles of insurance law, that the insured should be entitled to abandon and recover for a total loss, if the goods insured have been damaged by such peril, according to the American rule, to an amount exceeding one half their actual value, and, according to the English rule, to the amount of their entire value. But we say nothing of such a case here, because it is not necessary. This was an insurance on certain specific goods shipped and valued as one parcel, to be taken for all purposes as one subject of insurance, on board this vessel for this voyage. The ship on the voyage was cast away and lost, the goods were with some loss fished up, carried to the nearest market, and sold for a sum which, after deducting necessary expenses, amounted to less than half their value, they were duly and seasonably abandoned, and the court are of opinion, that 'his was a technical total loss, and such total loss as takes these goods out of the exception.

In considering what amounts to a constructive total loss, we must consider the different rule of law above alluded to as adopted and practised on in England and in this country. In

England, a ship is not regarded as constructively wholly lost, so as to warrant the assured in abandoning, unless it would cost more to repair the ship, in the condition and circumstances in which she is placed, than her value when repaired; and the same rule applies to goods damaged by the perils of the sea. But by the American law, if a vessel is damaged by a peril of the sea to half her value, or, to speak more exactly, to such an amount that the assurer, after repair, and upon an adjustment as of a partial loss, would have to pay more than half the value; and in case of insurance on goods, if damaged by peril of the sea to more than half their value; the assured may, in either case, consider the adventure at an end, abandon to the underwriters, and claim for a total loss. The existence and qualifications of this latter rule, authorizing the assured on goods other than memorandum articles, upon an interruption of the voyage and a damage of the goods insured to half their value, to abandon, is established and illustrated in the case of *Bryant v. Commonwealth Ins. Co.* and the cases there cited. 6 Pick. 131, 9 Pick. 485, and 13 Pick. 543.

We have not thought it necessary to review the English cases on this subject, many of which were cited in the argument, for the reason already given, that they all related to memorandum articles, and not, like this, to a specific exception of goods liable to particular damage, but not perishable in their nature, and not embraced in the common memorandum.

Nor have we found it necessary to examine the English authorities upon another point of some difficulty, where the attempt has been to extricate a loss from the exception of partial loss on memorandum articles, by showing that the loss sought to be recovered was a total loss of part of the goods at risk; and this distinction has sometimes been carried to great extent, and perhaps beyond what the true principle of the law would warrant. It is admissible only, we think, where goods of the same kind are separately invoiced and insured, or where insurance is made specifically upon bales, boxes or other packages, valued and insured by the bale or package, or number of packages, in parcels less than the whole. The loss of an en-

 Collins v. Charlestown Mutual Fire Insurance Company.

fire package or parcel thus separately valued and insured is a total loss of memorandum articles, and may be recovered as such within the exception. This point has been put on a right footing and the previous cases ably reviewed by a judgment delivered by Jervis, C. J., in the case of *Ralli v. Janson*, in the Exchequer Chamber, in May 1856. 6 EL & BL 422.

In the present case, the goods insured, tin plates, were all of one kind, invoiced, shipped and insured in one lot, valued as an entire subject, the whole were to some extent damaged, some entirely lost, so that no question can arise of being one entire subject of insurance, and a loss of more than half of that entire subject.

There is no adjudged case which holds that when such goods, liable to particular damage, but not to decay or destruction, by sea water, are shipped and insured, with an exception of liability for the partial loss, and the goods are damaged to more than half their value by a sea peril, the goods left at an intermediate port, so that by the established rule of law here the assured has the right to abandon, and he does seasonably abandon, this is not a legal total loss, for which he may recover. Upon principle the court are of opinion, that this is a total loss, not within the exception, and the plaintiffs are entitled to recover.

Judgment for the plaintiffs.

BENJAMIN COLLINS vs. CHARLESTOWN MUTUAL FIRE INSURANCE COMPANY.

Two partners, in an application for insurance on a building, which was required to contain "a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk," stated that they owned the land on which it stood. In fact, one of them, to whom the policy was made payable, owned it, and the other was charged on their books with half its cost. The partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his copartner, to whom the insurers, with notice of the facts, agreed that the policy should "stand good." *Held*, that the insurers were liable for a loss by a subsequent fire.

Collins v. Charlestown Mutual Fire Insurance Company.

A description in an application for insurance of a building as used "for the manufacture of lead pipe," or "of lead pipe only," includes the manufacture of wooden reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe.

THOMAS, J. This is an action of contract upon a policy of insurance on a lead mill. The parties insured were Benjamin Collins and George L. Stearns, partners under the firm of Collins & Stearns. Collins, the plaintiff, is a mortgagee of the premises, to whom the policy was payable in case of loss. The making of the policy and the loss by fire within the term being admitted, the defendants rely upon two grounds of defence. First, that there was a misrepresentation in the application of the assured as to the title of the estate. Secondly, a representation and warranty as to the use to which the building was then and should be thereafter applied, and a breach of that warranty and representation.

1. The estate was conveyed by deed to George L. Stearns, one of the partners. The legal title was in him. In the application, signed by Collins & Stearns, in answer to the question, "Do you own the land upon which the buildings stand?" the answer is, "Yes." The policy secures a lien upon the land and buildings. One of the provisions of the by-laws is, that "the policy shall become void and of no effect, if the application shall not contain a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk."

So far as respects the lien, the insurance company is not affected. The property is owned by one of the parties to the note. Each partner is liable *in solido*. The lien is therefore perfect. Nor is it easy to see how it was material to the risk whether the title to the estate was in one or both the partners.

But though the legal title to the land was in one of the partners, the equitable title was in the firm. Stearns held the estate in trust for the partnership. By the written articles of copartnership, Collins was to be charged on the books of the partnership with one half of the cost of the mill. Upon the books of the

partnership, Stearns was credited with the agreed value of the mill. The estate became part of the capital of the firm. It was the property of the firm, though the legal title was in one of the partners only. Such was the state of the title when the application was made. In the statement that Stearns & Collins owned the estate we see no misrepresentation material to the risk.

The case of *Smith v. Bowditch Mutual Fire Ins. Co.* 6 Cush. 448, is quite distinct from that at bar. By the 17th article of the by-laws of that company it was provided that any policy issued by the company should be void unless the true title of the insured should be expressed in the application for insurance; and the plaintiff had no legal title to the estate of which he represented himself the owner. He had only a bond for a deed. No lien therefore was secured. Nor was the true title of the insured expressed in the application.

In the case of *Davenport v. New England Mutual Ins. Co.* 6 Cush. 340, in answer to the question whether the estate was incumbered, the answer was in the negative, the estate being at the time subject to heavy mortgages. The case of *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray, 431, is to the same point. It goes no further.

In *Allen v. Charlestown Mutual Fire Ins. Co.* 5 Gray, 384, the distinction is made between the preceding cases and one in which the statement as to title was substantially correct, and where the difference, if any existed, did not impair the lien of the company or otherwise affect the risk.

But, as if to free the case before us from difficulty, in January 1854 the partnership was dissolved. Collins transferred his interest in all the assets of the partnership to Stearns. The dissolution and conveyance were made known to the insurance company, and on the 24th of March 1852, with full knowledge of the facts, they indorsed on the policy this agreement: "Agreed that this policy shall from this date stand good to George L. Stearns." And we think it does stand good, unless there is force in the second ground of defence, which is misrepresentation of the purpose for which the building was to be used.

Collins v. Charlestown Mutual Fire Insurance Company.

2. To the question, "For what purpose occupied, and by whom?" the answer is, "By the applicants, for the manufacture of lead pipe only."

The defendants offered evidence to show that the attic of the building was used for the manufacture of reels upon which the lead pipe is coiled. But the answer, and we think satisfactory answer, made by the plaintiff was, that the making of the reels upon the premises was a necessary and essential part of the manufacture of lead pipe. The evidence was submitted to the jury under these instructions: "that the term 'manufacture of lead pipe' would include all that was reasonably necessary and essential for carrying on the business of manufacturing lead pipe in the building insured; that if, for the proper and reasonable carrying on of the business, it was essential to manufacture reels upon the premises, by the machinery and in the manner proved, the representation that the building was used for the manufacture of lead pipe only was sufficient; that the mere fact that it was more economical or convenient to make reels upon the premises was not sufficient to authorize the insured to make such use of the premises." These instructions seem to us entirely correct.

In this view of the case, the question whether the word "only" was contained in the application becomes immaterial. It does not change the force of the words "manufacture of lead pipe," or exclude anything essential to it.

Judgment on the verdict for the plaintiff.

E. D. Sohier & H. G. Hutchins, for the defendants, cited, to the first point, *Davenport v. New England Mutual Fire Ins. Co.* 6 Cush. 340; *Packard v. Agawam Mutual Fire Ins. Co.* 2 Gray, 334; *Bowditch Mutual Ins. Co. v. Winslow*, 3 Gray, 431; *Parsons Merc. Law*, 511, 513, 514; *Work v. Merchants' & Farmers' Mutual Fire Ins. Co.* 11 Cush. 271; *Catlett v. Pacific Ins. Co.* 1 Paine, 615, and 1 Wend. 561; *Leathers v. Farmers' Mutual Fire Ins. Co.* 4 Foster, 259; *Foster v. United States Ins. Co.* 11 Pick. 85.

W. G. Russell, for the plaintiff.

Lewis & another v. Springfield Fire and Marine Insurance Company.

WILLIAM K. LEWIS & another vs. SPRINGFIELD FIRE AND
MARINE INSURANCE COMPANY.

Insurance against fire was effected on goods "contained in a granite store"; one of the walls gave way, and half of the store and the whole of the adjoining building fell; before there was time to remove the goods, fire broke out in that building. *Held*, that the insurers were liable for damage from fire, and from water used to extinguish it, to goods not displaced or injured by the fall.

ACTION OF CONTRACT upon a policy of insurance for \$10,000 against fire, "on stock, steam engine and boiler, fixtures, furniture and safe, contained in the new granite store, No. 93 Broad Street, Boston, Massachusetts," subject to certain conditions of insurance annexed, by which "druggists and apothecaries" are enumerated among the "trades and occupations, goods, wares and merchandise denominated extrahazardous;" and "applications for insurance must specify the construction and materials of the building to be insured, or containing the property to be insured, and, in case of goods or merchandise, whether or not they are of the description denominated hazardous or extrahazardous; and a false description by the insured of a building or of its contents, or omitting to make known any fact or feature in the risk which increases the hazard of the same, shall render absolutely void a policy issuing upon such description." Trial in this court, before *Bigelow, J.*, who made the following report thereof:

"The plaintiffs' said store No. 93 was separated from store No. 95 by a party wall of stone and brick.

"On the 22d of August 1854 this wall or the foundation thereof gave way, and the whole of store 95 and half of store 93, including the whole of the front wall of the latter store, fell and became a mass of ruins; while the other half of the plaintiffs' store was left standing, supported by a row of iron pillars, which prior to the accident ran through the middle of the plaintiffs' store for the purpose of supporting the floors thereof. Half the roof remained, and covered that portion of the store which remained standing after the accident.

Lewis & another v. Springfield Fire and Marine Insurance Company.

"At the date of the policy, and at the time of the accident, the plaintiffs occupied the store as tenants, and had stock therein to the amount of seventy thousand dollars and upwards.

"Shortly after the accident above mentioned, with an interval stated by the witnesses to have been between fifteen and forty minutes, a fire (supposed to have been occasioned by the commingling of chemicals) broke out amongst the ruins of the adjoining store aforesaid (which had been used as a drug store); which fire communicated with and burned portions of that part of the plaintiffs' store which remained standing, and also partially burned and damaged some of the goods therein.

"For the purpose of extinguishing said fire, large quantities of water were thrown by the fire department of the city upon the ruins of store No. 95, and into and upon that part of the plaintiffs' store which remained standing, and upon the goods remaining therein, whereby the said stock of goods remaining in that portion of said store was damaged.

"No portion of the goods for which the plaintiffs claimed damage under the policy fell; nor were they injured, otherwise than by fire or water, or both.

"The jury, by order of the presiding judge, returned a verdict for the plaintiffs, which is to be set aside if in the opinion of the full court it cannot be sustained."

H. W. Paine & D. Thaxter, for the defendants. 1. The description "contained in the new granite store No. 93" is a warranty that the property, while covered by the policy, shall be thus "contained" in said granite store. 1 Phil. Ins. §§ 757, 758, 866. *Wood v. Hartford Fire Ins. Co.* 13 Conn. 533. *Fowler v. Aetna Fire Ins. Co.* 6 Cow. 673, and 7 Wend. 270. *Wall v. East River Mutual Ins. Co.* 3 Selden, 370. Conditions of insurance annexed to the policy, *ante*, 159.

2. The stock, for injury to which the suit is brought, was not, at the time of the injury, "contained" in the store, within the meaning of the contract; for, by a true construction of the policy, "contained in" imports "protected by" the store. At the time of this fire the store had ceased to exist as a store and it is immaterial how long the store fell before the fire. If

Lewis & another v. Springfield Fire and Marine Insurance Company.

placing the goods on this mass of ruins is sufficient, then the plaintiff might recover if he had placed them there after the fire. [SHAW, C. J. Suppose the goods had been moved out to avoid the fire, would they not be within the description of and covered by the policy?] The fire would then be the proximate cause. If moved for any other purpose, they would not be covered by the policy.

C. P. Curtis & C. P. Curtis, Jr., for the plaintiffs, cited *Stokes v. Cox*, 1 H. & N. 533; *Hillier v. Allegheny County Mutual Ins. Co.* 3 Barr, 470; *Case v. Hartford Fire Ins. Co.* 13 Ill. 676; *Scripture v. Lowell Mutual Fire Ins. Co.* 10 Cush. 365; *Nelson v. Suffolk Ins. Co.* 8 Cush. 477; *Montoya v. London Assurance Co.* 6 Exch. 457; *City Fire Ins. Co. v. Corlies*, 21 Wend. 367; *Pentz v. Receivers of Aetna Fire Ins. Co.* 9 Paige, 568; Angell on Ins. §§ 115 & seq.

MERRICK, J. In support of their objection to the direction which was given to the jury, and to the right of the plaintiffs to recover a verdict for any sum of money whatever upon the facts set forth in the report, the defendants assert and attempt to maintain, first, that in obtaining the insurance upon their stock the plaintiffs warranted that it then was, and thereafter should continue to be, contained in their store described in the policy; and secondly, that the stock which was injured was not contained therein at the time of the occurrence of the fire.

It is unnecessary to discuss or even to notice the first of these propositions, because there appears to be an entire failure to substantiate the second, without which it is not pretended that the former can afford any defence to the plaintiffs' action. All the plaintiffs' stock was in their store, just as the defendants contend they warranted that it should be, when the partition between their own and the adjoining store began to give way. That was the commencement of one common and general disaster. The fire, and the falling of the walls and of other parts of the two stores, which immediately followed, were not separate and independent events, but were merely parts and successive circumstances in the progress of a single calamity. Though the cause and origin of the fire may perhaps be satisfactorily conjectured,

Campbell & others v. Wallace.

the precise moment when it was kindled is not known ; but the interval which elapsed before it was discovered, after the crash of the buildings had been heard, was certainly very brief. The witnesses who testified of it varied in their estimate of its duration from fifteen to forty minutes. This slight difference of opinion on a mere matter of judgment of the lapse of time is really of no importance. The material fact is, that the flames broke out and burned the plaintiffs' goods before there could have been any possible interposition for their safety, and must thus be considered as having occurred substantially at the same time with the other incidents of the disaster. They were all blended together in one catastrophe, and constituted a single event, upon a due consideration of which the rights of all parties are to be determined.

As it is thus shown that the defendants cannot maintain one of the two propositions, both of which are indispensable to sustain their objection, the direction to the jury to return a verdict for the plaintiffs was correct, and judgment must accordingly be entered upon it.

Judgment on the verdict for the plaintiffs.

HELEN CAMPBELL & others vs. JOHN WALLACE.

This court has no jurisdiction in equity to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and no certified copy of which has been filed in the probate court here.

BILL IN EQUITY to enforce the trust created by the following clause in the will of John Wallace, late of Clerkenwell in the county of Middlesex and Kingdom of England: "One fifth of all I possess to be sent to the care of John Wallace, son of James Wallace, 65 Eliot Street, Boston, to be put to interest for the sole use of my sister Helen as long as she may live, and at her death to be divided between her children living and the children of James Wallace, then living, of 65 Eliot Street, Bos-

ton, North America, share and share alike." This will, as appeared by the bill, was duly admitted to probate in the prerogative court of Canterbury, but never allowed in this state, nor any copy of it filed here, pursuant to the Rev. Sts. c. 62.

The defendant demurred to the bill, as setting forth no case within the jurisdiction of this court. And this demurrer was argued and decided at March term 1857.

A. A. Ranney, for the defendant.

E. G. Loring, for the plaintiffs.

THOMAS, J. The question raised by the demurrer is as to the jurisdiction of the court. The bill seeks to enforce the execution of a trust created by the will of an English subject, which has been duly admitted to probate in England, but has never been allowed in this state as the last will and testament of the deceased, under the provisions of the Rev. Sts. c. 62, §§ 17-20, 32.

The point raised by the demurrer is therefore, we think, covered by the decision of this court in *Campbell v. Sheldon*, 13 Pick. 8. That case was determined under the St. of 1817, c. 87, which gave this court power "to hear and determine in equity all cases of trust arising under deeds, wills, or in the settlement of estates." But the statute was held not to extend to a will, neither proved in this state nor a copy of it filed and recorded in pursuance of the provisions of the St. of 1785, c. 12, which were in substance those of Rev. Sts. c. 62, in the sections before cited.

The plaintiffs suggest that a more comprehensive jurisdiction in equity as to trusts is given by the Rev. Sts. c. 81, § 8, than by the St. of 1817; c. 87. This may be so; that is to say, the jurisdiction may be extended to trusts other than those created by deed or will; but as to trusts arising under deeds or wills, the jurisdiction under the St. of 1817 was full and complete, except in cases where there was an adequate remedy at law. We feel therefore bound by that decision. But if the point were a new one, the difficulties of exercising the jurisdiction prayed for are obvious, and, we incline to think, insuperable.

Demurrer sustained

 Thayer & another v. Tyler.

JOHN E. THAYER & another vs. JOHN S. TYLER.

It seems, that under the Rev. Sts. cc. 90, 92, no judgment can be rendered at the first term upon the default of a defendant who was out of the State at the time of the service of the summons, whether he has ever been an inhabitant of the State or not.

Under St. 1839, c. 158, judgment cannot be rendered against a foreign corporation, without such notice as is provided by the Rev. Sts. c. 92.

Service of process upon a foreign insurance company who have appointed an attorney in this commonwealth to accept service of process against them, as required by St. 1851, c. 331, must be made upon him.

A trustee in foreign attachment may object on *scire facias* that judgment was rendered in the original action at the first term against the principal defendant, who was not in the State at the time of service, without giving the further notice required by statute in such cases.

SCIRE FACIAS against a trustee in foreign attachment. The original writ was on a policy of insurance against the Franklin Marine and Fire Insurance Company, a corporation established by the laws of New York, and was served on the 3d of September 1853 upon Tyler as trustee. The only service of it upon the corporation, as stated in the officer's return, was "by delivering to John S. Tyler, as the agent of said company, a true copy of this writ by me attested," on the 16th of September. Tyler throughout that month was an agent of the corporation, authorized to issue policies in their behalf, and to adjust losses under the same. He did not however make the policy sued on, and was not an attorney appointed by the company under St. 1851, c. 331, to receive service of process. But another person residing and doing business in Roxbury was such attorney, duly constituted. The corporation had actual notice of the action before the return day. At the first term the corporation and trustee, not appearing, were defaulted, and judgment rendered against them, and the present action commenced. The case was submitted to the decision of this court upon the above facts and others not material to the decision.

This case was argued at March term 1857.

J. P. Putnam, for the plaintiffs. 1. Assuming that a foreign corporation is an "absent defendant," the service was sufficient. By the Rev. Sts. c. 90, § 45, 1st, "if the defendant is out of the State at the time of the service of the summons," the service is

Thayer & another v. Tyler.

to be made at his last and usual place of abode; "and," 2d, "if the defendant never was an inhabitant of the state," the summons is to be served upon his tenant, agent or attorney, "and if there be no such tenant, agent or attorney within the State, known to the officer or to the plaintiff, the officer shall certify the facts in his return, and the court *may* thereupon" order further notice, as provided in *c. 92*. The provision of *c. 90*, § 48, that "in all cases when the defendant is out of the State at the time of the service of the summons, he *shall* be entitled to further notice," as provided in *c. 92*, must be referred and restricted to the first class of cases, described in § 45 in precisely similar language — residents and citizens temporarily out of the State; not those who have never been citizens. Those are within the provision of *c. 92*, § 3, that "if the defendant is not an inhabitant or resident within the State," or if his residence is not known, or he has no last and usual place of abode, nor any tenant, agent or attorney, the court "*shall* order the action to be continued" until further notice can be given — which implies that, if there is such an agent, the action shall not be continued. To hold all these provisions applicable to those who never resided here would put §§ 45, 48 in conflict with each other, unless "shall" and "may" are equivalent, in which case the whole of § 45 would seem to be superfluous.

2. The original defendants, being a foreign corporation, are not within the Rev. Sts. *c. 90*, §§ 45, 48; *c. 92*, § 3. *Peckham v. North Parish in Haverhill*, 16 Pick. 286. Such corporations were first made liable to be sued, and their property to be attached, by *St. 1839, c. 158*, which provides that "the service of the writ in such case shall be made in the manner provided in" the Rev. Sts. *cc. 90, 92*, "with such further service, if any, as the court to which the writ is returnable may order." Chapter 92 of the Rev. Sts. does not provide for "service," but only for notice in certain cases where service has already been made and the court already has jurisdiction. The service required by *c. 90*, § 45, had been made. And the court did not, as they might have done, require any further service under *St. 1839 c. 158*, but ordered judgment.

Thayer & another v. Tyler.

A foreign corporation, having an agent residing here to conduct a branch of its business, can hardly be considered as out of the Commonwealth, at least for the purposes of notice, within the meaning of the Rev. Sts. But if it can, the Rev. Sts. c. 92, § 3, do not require the court to order notice to a party who has already had actual notice. *Morrison v. Underwood*, 5 Cush. 52. "Shall" in that section is to be construed "may." *People v. Cook*, 14 Barb. 259. *People v. Smith*, 1 Parker C. C. 374. *State v. Click*, 2 Alab. 26

3. The officer's return shows a sufficient service on an agent of the corporation. The St. of 1851, c. 331, requiring the corporation to have a particular attorney upon whom service may be made, does not repeal the Rev. Sts. cc. 90, 92, nor preclude service on some other attorney.

4. A trustee cannot plead or prove anything on *scire facias*, which he could have pleaded or given in evidence in the original action. *Wilcox v. Mills*, 4 Mass. 218. *Sigourney v. Stockwell*, 4 Met. 518. *Smith v. Eaton*, 36 Maine, 298.

J. W. May, for the defendant.

DEWEY, J. It is difficult to ascertain satisfactorily the precise intent of the legislature in the enactments in the Rev. Sts. c. 90 and c. 92, in relation to the service of writs upon absent defendants, and particularly as to the necessity of a continuance of the action and an order of the court for further notice to the defendant.

In the case of *Leonard v. Bryant*, 2 Cush. 32, where the tenant in a real action was out of the State at the time of the service, and not then a resident or inhabitant, although he formerly had been, and, as the facts add, then "had no last and usual place of abode in Massachusetts," it was held, that, in addition to the service, prescribed in c. 90, § 47, of leaving a summons with the tenant of the premises, the case should be continued and notice given in the manner prescribed in c. 92, § 3; and a judgment rendered at the first term upon default was held invalid, and subject to be avoided by a third party, without a writ of error.

In the case of *Downs v. Fuller*, 2 Met. 135, which was a case

of an absent debtor having left his family here, but himself an absconding debtor, a judgment taken by the plaintiff at the first term, and without complying with the provisions of c. 92, § 3, was held invalid and voidable by a third party.

In the case of *Packard v. Matthews*, 9 Gray, 311, the defendant was at the time of the service out of the Commonwealth, and not a resident within the same. Upon a return by the officer that he left a summons for each defendant "at their last and usual place of abode, they being out of the Commonwealth at the time," a writ of error was maintained on the part of the defendant, and the judgment reversed, for want of a continuance and order of notice to the party.

The case of *Morrison v. Underwood*, 5 Cush. 52, relied upon by the plaintiffs, was decided by the court upon the single ground of a waiver of further service and a judgment taken by consent; and was not intended to overrule the cases of *Downs v. Fuller* and *Leonard v. Bryant*, although those cases do not seem to have been adverted to in the published opinion of the court. The case of *Downs v. Fuller* would have required the reversal of that judgment, but for the other circumstances appearing in the case, which it was thought removed the ground for sustaining a writ of error.

It is however contended that a distinction exists between persons who have never been inhabitants of the State and those who have removed therefrom, including those temporarily absent; and it is said that foreign corporations are embraced in the class of those who have never been inhabitants here, and the service to be made on them is of the latter character.

Upon this point, the argument on the part of the plaintiffs is that § 48 having used the words "when the defendant is out of the State," which are the same words used in § 45 in describing a class of persons in distinction from those who "never were inhabitants of the State," its provisions must be confined to that class; and if there were no other provisions to be considered in connection therewith, certainly the argument would be a plausible one. But upon recurring to this chapter of the revised statutes, it will be seen that in § 44 the phrase "a person

Thayer & another v. Tyler.

out of the State" is clearly used to embrace those who have formerly been inhabitants as well as those who never were inhabitants. So also in § 47, in reference to real actions, the phrase is used in the same double aspect. Indeed, we have in the case of *Leonard v. Bryant, supra*, directly decided that § 48 does apply to "defendants out of the State" in real actions, and that *c. 92, § 3*, does apply to that class of cases. The words of § 48 of *c. 90*, and § 3 of *c. 92*, seem to apply to all cases of defendants out of the State at the time of the service of the summons, and to embrace as well those who never were inhabitants of the State as those who once had a domicile here.

If the case were therefore that of an individual, the provisions of the statute were not complied with, and the judgment was invalid for that cause.

The further inquiry is, whether the like rule in all respects applies to foreign corporations, as to individuals residing without the State. This is regulated by *St. 1839, c. 158*: "The service of the writ in such case shall be made in the manner provided in the ninetieth and ninety-second chapters of the revised statutes, with such further service, if any, as the court to which the writ is returnable may order." It is said on the part of the plaintiffs that *c. 92* does not provide at all for service, but merely for notice to the party served, and so is not applicable. We think this construction will not do; but on the contrary that the proper view to be taken is, that the legislature in the act of 1839 intended to use the word "service" as properly descriptive of all that was required to be done by *c. 92*, and that they did not consider the service fully completed independently of the performance of the acts required by *c. 92*. In addition to all that was required by *cc. 90 and 92*, they authorize and require such further service as the court may order.

It is then said that a foreign corporation, having an agency established here, and a branch of their business here, should be treated as a domestic corporation for the service of writs. If this were so, there would seem to be no proper officer to serve processes upon, nothing beyond an agent to make insurances. However this might have been independently of the provisions

Thayer & another v. Tyler.

of §. 1851, c. 331, it would seem that by that enactment, requiring every such foreign corporation, before transacting any business within this state, to appoint by a written power, duly filed with the secretary of this commonwealth, some person resident therein their attorney, and providing that service of process upon such attorney shall be deemed to be sufficient service upon his principals, ample provision was made to secure the rights of creditors in Massachusetts, and to furnish all reasonable facilities for serving process on foreign corporations doing business here, and that no necessity exists for introducing an exception of a very doubtful character based solely upon the fact that such corporation was transacting business here. Such attorney was duly appointed in the present case, and a service upon him would have been effectual as against his principals. But no such service was made.

Can the defendant, on this writ of *scire facias*, avail himself of the invalidity of this judgment against the principal defendants? As a general rule, on such *scire facias* nothing could be pleaded which he might have pleaded in the original suit. But the answer to this objection is that prior to the time of the rendition of this judgment there was no cause of complaint on the part of the defendant. The preliminary proceedings were correct, the case was properly in court, and the defendant could not have pleaded a want of proper service, but the court might at any time during the term, on suggestion of the plaintiffs, order a continuance and further notice to the principal defendants. The time for those acts had not yet passed, and no ground existed for complaint or objection in that respect. The judgment having been taken under these circumstances, the present defendant had no day in court to interpose this objection, and has been guilty of no laches in respect thereto.

Such being the case, and the judgment against the principal being shown to be invalid, this defence must avail the trustee, when sought to be charged on the *scire facias*.

Judgment for the defendant

**FREDERICK M. PINGREE vs. HUDSON RIVER INSURANCE COMPANY
& Trustee.**

An attachment by trustee process against a foreign corporation is defeated by a certificate of discharge of the trustee in insolvency.

TRUSTEE PROCESS against a foreign corporation, and John S Tyler as trustee, who answered that on the 15th of August 1854 the time of service, he had funds in his possession; that on the 25th of August he received a written notice, dated the 10th of August, from John O. Mott, informing him that Mott had been duly appointed in New York to take possession of all the goods and credits of the corporation, wheresoever existing; that he afterwards received a copy of a decree made by the supreme court of New York in October 1854, adjudging the corporation insolvent, and dissolving it, except so far as was necessary to enable Mott, who was appointed by the decree a receiver, to collect debts and recover property in its name; and that on the 16th of September 1854 Tyler applied for the benefit of the insolvent laws, and all his goods were taken possession of by a messenger, including the sum due from him to the corporation, and he afterwards received his certificate of discharge in insolvency.

C. W. Loring, for the plaintiff.

J. W. May, for the trustee.

DEWEY, J. Under the decisions of this court in *May v. Breed*, 7 Cush. 41, and others of like character, we suppose it must be assumed that the assignment of the assets of the principals in New York, under the insolvent laws of New York, would not have any validity as against an attachment made here by one of our citizens, seeking to collect a demand due here.

It appears that insolvent proceedings had been instituted against the principal in the State of New York before the service of the trustee process in Massachusetts, if we give effect to the statement of the trustee in his answer, and the letter therein referred to; but however that may have been, they were only

the commencement of proceedings, and no order had been passed declaring the principal insolvent, and requiring the suspension of all further business and the liquidation of all its affairs, until after the attachment by the trustee process upon the defendant had been duly served. Nor can the position be maintained that this was a defunct corporation, and no judgment could therefore be rendered against it in October 1854, as the facts do not show that the corporation was actually dissolved, but on the contrary its corporate existence and name were continued for the purpose of closing its concerns.

Independently of the proceedings in insolvency in Massachusetts in reference to John S. Tyler, the supposed trustee, there would seem to be no question as to charging him.

But it appears that on the 16th of September 1854, one month after the service of this trustee process and attachment, the trustee became the subject of insolvent proceedings in Massachusetts, and those proceedings were regularly continued to their proper completion.

Had the original suit by Pingree been one of an attachment of the property of Tyler, then, by force of our insolvent law, *St. 1838, c. 163*, such attachment would have been dissolved. But the attachment here made was an attachment of the property of the Hudson River Insurance Company, and not an attachment of the goods, estate or credits of Tyler. The Hudson River Insurance Company have not been the subject of any proceedings under our insolvent law, and no attachment of their property or effects has been discharged therefor under the provisions of *St. 1838, c. 163*.

The proceedings in insolvency against Tyler, if they have any effect to defeat the attachment of the credits of the Hudson River Insurance Company in his hands, must so operate because the continuance of the same would be in contravention of the principles of our insolvent law, and in contravention of the rights secured to Tyler as an insolvent debtor.

As regards all cases of such party being summoned as trustee of any goods, effects or credits of any creditor of the insolvent who was a citizen of Massachusetts, the discharge of the trus-

Pingree v. Hudson River Insurance Company & trustee.

tee from his preëxisting debts would of itself be a good bar, and a discharge of the trustee process. But it is said that Tyler's debt to a citizen of a foreign state would not, by force of a state insolvent law, necessarily be barred. This is so; and if the question were between such citizen of a foreign state and Tyler, this would seem to be a good answer to any defence set up under such discharge in insolvency. But the question is of a different character. It is between a creditor of a citizen of a foreign state, or, to state the case more accurately, a foreign corporation. And the inquiry is, whether the continuance of the attachment is not incompatible with the provisions of the insolvent law in respect to foreign creditors. It is true that they may not be bound to come here and file their claims against the insolvent, and take their *pro rata* dividends. But they have a right so to do, and the debtor has the right to have this privilege, and the benefits that would result to him therefrom by way of a discharge, unaffected by any proceedings against him to secure a debt of a third person.

It would seem therefore that the service of the trustee process upon Tyler should not prevent the proving of the claim of a foreign creditor before the insolvency court in Massachusetts; and, if proved, it would of course be discharged, or be liable to be discharged, in the same manner as the other debts of the insolvent. Such debts might also be a component part of the debts in reference to which a majority of the creditors might signify their assent to a discharge of the insolvent. These proceedings which are secured to the parties, and which may be beneficial to the debtor, will be materially affected if this trustee process is maintainable, and the trustee charged thereon. In the opinion of the court, the proceedings in insolvency having been instituted against John S. Tyler, the supposed trustee, before he was charged as trustee, constitute a sufficient reason for discharging him from liability in this suit.

Trustee discharged.

COMMONWEALTH vs. WILLIAM S. TUCKERMAN.

The treasurer of a railroad corporation is an "officer, agent, clerk or servant of an incorporated company," within the Rev. Sts. c. 126, § 23, relating to embezzlements by such persons.

A treasurer of a railroad corporation, who had embezzled their funds, called upon a friend of his, who was a surety upon his official bond and stockholder in the corporation, for advice; and he urged him to go to the directors, and make a clean breast of it, and told him that it would be for his interest to make a full confession; but said nothing, in terms, of a prosecution; told him that the disgrace was in doing wrong, not in suffering punishment for it, and he had better stay and meet the punishment; and (as he testified) "advised him as a friend, a son." The next day they went together to see one of the directors, who, on this stockholder suggesting that he had influence with the other directors and could prevent a prosecution, stopped him, saying that he could and would make no promises, did not know what his own power or duty was, but would do all he rightfully and properly could to prevent his arrest and prosecution, and that he must confide wholly in him and his discretion. *Held*, that confessions made after these conversations were admissible in evidence against him.

If money of a railroad corporation is received by their treasurer, and by him deposited to his credit as such treasurer, and afterwards drawn out by him either in bills or coin, such bills or coin are the property of the corporation, and, while in the hands of the treasurer, subjects of embezzlement by him; and if he afterwards, while still treasurer of the corporation, fraudulently converts such money to his own use, without their consent or knowledge, and without claim of right, it is embezzlement; although the guilty intent does not exist at the moment of drawing the money out of the bank, but is formed afterwards; and although at the time of the fraudulent conversion he intends to restore the amount, and has property sufficient to secure its restoration.

Upon the trial of an indictment for embezzlement, other previous acts of a similar character, enumerated with the one charged in the indictment in a paper drawn up by the defendant as a statement of all sums taken by him, are admissible in evidence to show the intent with which the act charged was committed.

It is not necessary, in order to constitute embezzlement, that there should be a demand of the money alleged to have been embezzled, or a denial of its receipt, or any false account given of it, or false statement or entry concerning it, or refusal to account for it.

INDICTMENT on the Rev. Sts. c. 126, § 29, against the treasurer of the Eastern Railroad Corporation for embezzling bank bills for \$5000, the property of the corporation. Trial in the municipal court of Boston at December term 1856 before *Abbott, J.*

The attorney for the Commonwealth called John B. Parker, for the purpose of proving confessions of the defendant. The defendant's counsel objected that these had been obtained and made under the influence and by means of encouragement and menace; and, to establish this, called and examined Benjamin

T. Reed, for the purpose of proving that he had advised and encouraged the defendant to confess upon a promise and encouragement that it would be better for him to do so, and worse for him if he did not; and for the purpose of proving that it was under the continuing influence of hope and fear thus excited that the defendant made confessions in the hearing of Parker.

Reed testified as follows: "I was treasurer and director of the Eastern Railroad Corporation for some years, and continued a director until two or three years since. On the evening of the 27th of June 1855, at which time I held stock in that corporation, though not in my own name, the defendant came to my house at Lynn, late in the evening. His wife was with him. After sitting half an hour, they rose to go home. I went with him towards the stable, where his horse was standing, to see them off. He said nothing until his wife, addressing him, said, 'William, why don't you tell Mr. Reed what you came for?' He made no reply, but began to cry. He then said something, the substance of which was that he was in trouble and wanted my advice. I asked him if he was a defaulter. He said he had loaned money of the Eastern Railroad Company, and could not get it back as it was promised and as he had expected, and in the time when it would be wanted, and that he had deceived me, or had imposed on me. I said he had better go to the directors directly, and make a clean breast of it. The exact words I do not remember; but the substance and purport was, it would be for his interest to go and confess all, and afford all the assistance he could. This was repeated over and over. I said it would be for his interest to go and make a full confession. The expression 'clean breast' was one of the very first expressions I used. I felt great distress and earnestness, and I suppose my manner expressed it. I arranged with him to meet Mr. Hooper the next morning, that he might make a statement which should be fuller than he made to me. By my procurement Hooper came to my office the next morning, and there Tuckerman met him. I then told Hooper that I had said to Tuckerman he had better make a confession of all he had done. I left him and Hooper together. He resigned his office of treasurer that day; but he continued to remain in the

office for some weeks, assisting, making explanations to the directors and the committee. I never said or did anything, and do not know that any one did, to efface the impression of encouragement or hope which I thus made."

Upon cross-examination Reed testified: "He said, in answer to my question, that he had used the money for other purposes than those of the corporation. I said, Go to the directors, I can't help you. His wife said she had heard of it that evening at Watertown, and could not sleep till she had made him come down and ask my advice. I told him to commit no violence on himself, nor run away; that the disgrace was in doing wrong, not in suffering punishment for it; he had better stay and meet the punishment. I advised him as a friend, a son. He had been my clerk for ten years. I told him it would be for his interest to go and make a full confession. I know I used words which conveyed that meaning in substance. I said nothing, in terms, of a prosecution. I did not go into details. I asked the amount. I think I went up as high as \$20,000. He did not know, or did not say, the full amount. I advised him to meet Hooper as a principal director. He engaged to do so. I told him he had better go and make a clean confession and a clean breast of it. Hooper said nothing to Tuckerman in my presence."

On reëxamination Reed said: "He named no sum until after I advised him to make a confession. He made no allusion to any sum received of Ruel Williams; no allusion to this \$5000 said to be drawn on the 26th of June. I told Hooper the next morning what I had advised Tuckerman, and repeated it all in presence of both. I procured him this office of treasurer, and was one of his sureties. The bond was \$20,000."

The counsel of the defendant thereupon contended that this evidence established a legal cause for rejecting the confessions offered, and objected to their admission. But the court overruled the objection, and admitted the evidence, "not upon the ground that the influence, if any was ever created, did not continue until the time when the confession was made to Parker, but on the ground that the facts appearing in the testimony of Reed were

insufficient to exclude confessions." Parker was then admitted to testify, and gave evidence of confessions by the defendant which were material in the case.

The attorney for the Commonwealth then called Samuel Hooper, and offered to prove confessions made by the defendant to him upon the 28th of June 1855. To this evidence the defendant's counsel also objected, upon the ground that the confessions made to him were obtained and made under influence, and by means of encouragement and menaces, which menaces, encouragements and inducements they claimed had been made or held out by Hooper, and by Reed in the presence of Hooper; and for this purpose they were permitted to examine Hooper upon his *voir dire*, when he testified as follows:

"I went to Mr. Reed's office on the morning of June 28th, by request of Reed, to meet the defendant. The defendant was there. Reed was there. The defendant was in great distress, excited. Reed urged him to tell me the whole story. The defendant was weeping, greatly agitated. Reed urged the defendant to make a full confession; said I had influence with the directors, and would see that he was not complained of or arrested. I told Reed to stop there; said I neither could nor would make any promises; I had no power to bind the directors; that I had no vindictive feelings against him; that he knew me and must confide in me to do what was right; that I neither knew what my power or my duty was; that I did not know what was right to do. The defendant was reluctant to speak for a good while. Reed tried very hard to persuade the defendant. I told him I had not the power; was only one of the directors, and did not know what was proper and right for me to do. I was on the finance committee, and considered I was there as one of the committee. I told him I had not the power, but had no vindictive feeling, and would do all in my power that I properly could do to prevent his arrest, or any proceedings by the directors, and I have no doubt that I expressed to him in substance what I intended to do. After some considerable time, half an hour's talk or so, the defendant seemed to change and make up his mind. My object was to ascertain the

condition of the affairs of the company. He was not in a condition to make a statement in detail at that time, nor I to receive one. He made at that time a general statement of his defalcations as treasurer, and said he had the means at home of making an exact and detailed statement of them, which would be accurate, and I told him to make out a written statement, and that any favor to be shown him by the directors, if any, would depend on that statement's being full and correct. I told the defendant I would make no promise of any kind; he must confide entirely in me, and I would do all I rightfully and properly could to prevent his arrest, or his being arrested."

On cross-examination Hooper said: "I said I would make no promises; he must confide in me that, unless I was required by my duty to do so, I should not have him arrested. I told him throughout the interview I neither could nor would make any promises; that he must confide entirely in me, and my discretion, and that I should do in every respect precisely as my judgment and discretion should direct me; that I neither knew what I had the power to do, nor what was right for me to do."

It also appeared that at this time no suspicion had been entertained of the defendant by the officers of the company; that he was under no arrest; that no complaint had been made; and that he met Hooper in consequence of what passed between him and Reed at the interview testified to by Reed.

On reëxamination Hooper testified: "The defendant was in such a condition of mind and feeling on the 28th, that I did not wish to rely upon the details of his statements; I did not think them at all to be depended upon. He said nothing then of the sum of \$5000 received of Ruel Williams, or of any sum drawn from the bank on that day. I never heard anything of that until the 29th, when, finding an entry of \$5000 on the 26th, I inquired of him concerning it. I arranged with him on the 29th to remain and assist the directors upon, from and after that day, by his explanations and corrections. He did stay, and did assist constantly and faithfully, as far as I knew; and the directors did not, nor any of them, nor any of the committee of investigation, institute this prosecution."

Reed, on being recalled, testified that he fully understood Hooper to say to Tuckerman that he must confide in him ; that if he made a full and clear statement, he might be relied on.

The defendant's counsel contended that this evidence established legal cause for rejecting the confessions as obtained and made under the influence of promises and threats ; and objected to their admission. But the court overruled the objection, and admitted the evidence ; and Hooper then testified to confessions of the defendant which were material in the cause ; and among other things stated that the defendant exhibited and explained to him a written list (which was produced at the trial) of the different amounts of the property of the company which the defendant had appropriated to his own use ; and that he explained the last item upon the list, which was "June 26th, \$5000," to be \$5000 drawn from the Merchants' Bank, originally received from Ruel Williams, and the subject of this indictment.

The evidence in the case tended to show that on the 26th of June 1855 the defendant, as treasurer of the Eastern Railroad Company, received from Ruel Williams \$5000 towards a debt due to the company ; that he deposited it the same day in the Merchants' Bank to his credit as treasurer of the company, and duly entered the fact of the receipt, and the source from which it came, and the debit thereof upon its deposit, to the Merchants' Bank ; that he drew his check on the same day as treasurer of the Eastern Railroad Company upon the Merchants' Bank for \$5000, which was paid out on that check to some one ; that this check was not entered by the defendant in the books of the company until after his confessions to Hooper, when he charged the amount of it to himself ; that it was the defendant's uniform practice not to make entry of money drawn from the bank until he applied it to the making of payments for the company, when he charged it to the accounts to which he had applied it ; that in his confession and statement to Hooper on the 29th of June he represented that, of the \$5000 so drawn, he changed \$3000 into smaller bills to use for the purpose of going to Canada, when he had contemplated going to Canada, but was induced to abandon this intention, and he had

them in a safe place, and said he would give them to Hooper, which he subsequently did on the 5th or 6th of July; and that the \$2000, balance of the said \$5000 drawn on said check, he had used for pressing purposes of his own, which he refused to disclose, and never did disclose.

The counsel for the government offered to give in evidence acts of embezzlement of the property of the Eastern Railroad Company, other than and distinct from that charged in the indictment, and committed by the defendant on different days and times, from six months to four years before the act charged in the indictment, while the defendant was treasurer of the corporation. To this evidence the defendant's counsel objected. But the acts were admitted by the court, "so far, and only so far, as they were contained or referred to in the written statement made by the defendant to Hooper, one item of which was the subject of this indictment; not for the purpose of proving, or as having a tendency to prove that the defendant took the money charged in the indictment; but for the purpose of showing that if he took it, it was done with the fraudulent intent to convert it." Evidence was accordingly given, against the defendant's objection, tending to show that the defendant had from time to time embezzled moneys, notes and other similar property of the Eastern Railroad Company, of different amounts and at different times, amounting in all to \$174,000; and had concealed the same from time to time, by entries, or omission of entries, in the books and accounts of the corporation, and in trial balances rendered by him to the corporation.

The defendant's counsel presented to the judge many prayers for specific instructions, one of which was "that the treasurer, in regard to moneys or funds under his control and administration, including such funds as were deposited or drawn on the 26th day of June, is not such an officer or agent that the indictment alleging embezzlement of the property of the corporation can be maintained against him;" and the others, as they contended, involved the doctrine that there could be no embezzlement if there was no demand of the money, no denial of the receipt of it, and no false account given of it; and that, in order to con-

stitute embezzlement, there must be some false entry or false statement, or an express or implied refusal to account.

The judge refused to give the instructions prayed for; and instructed the jury "that, in order to make out the offence charged, the government must prove that the defendant, while treasurer of said company, fraudulently converted to his own use the whole or some part of the money described in the indictment, which was the property of said company, and which had been entrusted to him as their treasurer, and that this conversion was without the consent or knowledge of said company, and without claim of right on the defendant's part, and that this conversion took place while the defendant was treasurer of said company; that if the jury were satisfied that such conversion took place at some time, but were in reasonable doubt whether it was before or after the defendant ceased to be treasurer, it would be their duty to acquit him; that the money converted must be the property of said corporation; and upon this part of the case, if money was deposited in a bank by the defendant to his credit as treasurer of said company, which belonged to said corporation, and the defendant after such deposit drew his check upon the bank, and received the amount of it in bills or coin, either from the bank or any other person who might take it and receive the amount from the bank, the bills or coin so received upon said check would be the property of said corporation, while in the hands of the defendant as their treasurer, and the subject of embezzlement by him, if the other facts necessary to make out the charge were proved; that the government must make out a fraudulent taking and conversion; that what was universally understood by the term 'fraudulent' as well defined the character of the conversion to be proved, as any form of expression — it must be attended and characterized by some deceit, concealment or trick; that proof of a neglect to account for money received by the defendant as treasurer, or proof of a taking and conversion of money of the corporation, did not constitute, in and of itself, the crime of embezzlement, or, alone and unattended by any other circumstances, was not sufficient evidence of it; that the non-accounting might

be from accident, forgetfulness or carelessness; or the conversion might be under a *bona fide* claim of right, however groundless, that in fact the non-accounting or conversion by the defendant would only be evidence which the jury were to consider in connection with all the facts and circumstances proved, as bearing on the question of fraudulent intent; that upon this part of the case, taking all the evidence put in, the jury were to be satisfied, not only of the conversion, but that it was with a fraudulent intent; but if the jury were satisfied that the defendant, acting as treasurer, took and used the money of the corporation, intrusted to him, for his own purposes, either by appropriating it to his own personal wants, or by lending it to third persons on his own account, and did this, knowing he had no right so to do, without the consent of said company or their officers, and concealing such conversion from them, it would amount to a fraudulent conversion of the money of the company, although at the time of such taking the defendant intended to restore what he had so appropriated, before it should be known, and believed he should be able to do so, and had in his possession property sufficient to secure the full amount so taken; that in reference to other acts of embezzlement, which had been put in evidence, they were only to be considered by the jury in passing upon the intent with which the money charged in the indictment was converted, if converted at all; that the conversion must be first proved by other distinct and independent evidence, and those other instances of embezzlement were not to be used or considered in deciding the question of taking, but only in passing upon the intent, if the conversion was first established by other testimony; that upon the question whether the whole \$5000 described had been fraudulently converted, or only a portion of it, the rule of law applicable to it would be this; that if it was proved that the defendant drew a certain amount of money belonging to the company from the bank, where it was deposited usually and in his name as treasurer, and took the money into his own possession, for the purpose and with the design of appropriating it to his own use and putting it out of and beyond the control and power of the company, and concealed such

drawing from the company and its officers, and then changed the bills so drawn by him, for more convenient use for his own purposes, and absolutely used and appropriated a portion of it to his own wants, and kept the rest, not so used, concealed from and out of the control of the company and its officers for some length of time, it would amount to a fraudulent conversion of the whole sum so drawn, although a part of it was never beyond the defendant's control, and was afterwards restored by him to the company after such facts had been communicated to the officers of the company; that upon these several propositions the burden of proof was upon the government; that although the court had decided the evidence of the confessions of the defendant competent to go to the jury, the weight of the testimony so admitted was a question solely for them, and, in passing upon the degree of credit and weight to be given to the evidence, they were carefully to consider all the facts and circumstances under which the confessions were made, and if they came to the conclusion that such circumstances proved were sufficient to cast suspicion and doubt upon the evidence, they had the right to disregard it entirely in passing upon the questions before them."

The jury returned a verdict of guilty of embezzling bills of the Merchants' Bank of the amount and value of \$2000, as set forth in the indictment, and the defendant alleged exceptions.

J. A. Bolles, (*R. Choate* with him,) for the defendant. 1. The defendant, as treasurer of the Eastern Railroad Company, was not an "officer, agent, clerk or servant of any incorporated company," within the meaning of Rev. Sts. c. 126, § 29, relating to embezzlement.

2. The confessions made to Parker and Hooper were not voluntary, but were made under authorized inducements, of a personal application and of a temporal character. Joy on Confessions, 4, 5, 23 & seq. *Commonwealth v. Morey*, 1 Gray, 461. *Commonwealth v. Taylor*, 5 Cush. 605. *State v. Grant*, 22 Maine, 171. *State v. Crank*, 2 Bailey, 66. If the defendant was or may have been brought to confession by the induce-

ments, the form of words is immaterial. *Commonwealth v. Knapp*, 9 Pick. 496.

Whatever Reed promised in Hooper's presence, unless contradicted, must be taken as said by Hooper. *Regina v. Luckhurst*, 6 Cox C. C. 243. *Regina v. Taylor*, 8 Car. & P. 733. *Regina v. Laughner*, 2 Car. & K. 225. *Regina v. Garner*, 2 Car. & K. 920. Reed, and still more Hooper, spoke with authority; both as stockholders; Reed as the defendant's friend and surety on his bond; and Hooper as director, as "principal director," as one "having influence with directors," as a member of the "finance committee," and speaking to the defendant as such. Both were pecuniarily concerned, as individuals; Hooper was officially representing the company, and, as a director, the employer and master of the defendant. As such he was authorized to offer inducements. *Regina v. Moore*, 5 Cox C. C. 555. *Regina v. Taylor*, 8 Car. & P. 733. *Regina v. Laughner*, 2 Car. & K. 225. Joy on Confessions, 5. *Rex v. Parratt*, 4 Car. & P. 570. *Rex v. Kingston*, 4 Car. & P. 387. *State v. Phelps*, 11 Verm. 116. A prosecutor is not merely he who has begun proceedings, but any one who, from his close relation to the offence, is likely to prosecute. *Regina v. Luckhurst*, 6 Cox C. C. 243. *Regina v. Moore*, 5 Cox C. C. 555. *Commonwealth v. Chabcock*, 1 Mass. 144. Authorized inducements, however slight, of the character specified exclude all subsequent confessions; nor is the rule varied where the defendant makes the first overtures or propositions of confessions. 1 Greenl. Ev. § 223. *Commonwealth v. Morey*, 1 Gray, 461. *Commonwealth v. Taylor*, 5 Cush. 605. *State v. Phelps*, 11 Verm. 116. *Regina v. Luckhurst*, 6 Cox C. C. 243. *Rex v. Kingston*, 4 Car. & P. 387. The promises made are as clearly inducements as any reported. Cases already cited. *Rex v. Thomas*, 6 Car. & P. 353. *Rex v. Walkley*, 6 Car. & P. 175. *Regina v. Hewett*, Car. & M. 534. *Meynell's case*, 2 Lewin C. C. 122. *Regina v. Garner*, 2 Car. & K. 920. *State v. Guild*, 5 Halst. 163.

3. The bank bills alleged to have been the property of the Eastern Railroad Company were not their property at the time of the alleged conversion, so as to be the subject of embezzle-

ment. They were not the property of the company, while in the bank. *Commonwealth v. King*, 9 Cush. 284. *Rex v. Walsh*, Russ. & Ry. 215. The defendant was not bound to pay them over to the company *in eadem forma*. Rosc. Crim. Ev. (2d ed.) 449. *Rex v. Taylor*, Russ. & Ry. 63, and 3 Bos. & Pul. 598. At common law, for criminal purposes, the mere possession of the servant was not the master's possession, and gave him no ownership. 2 East P. C. 568. *Commonwealth v. King*, 9 Cush. 288. The English statutes on the subject of embezzlement recognize and provide for this doctrine. Sts. 33 H. 6, c. 1. 21 H. 8, c. 7; 15 G. 2, c. 13, § 12; 17 G. 3, c. 56; 39 G. 3, c. 85; 7 & 8 G. 4, c. 29, § 47. 2 East P. C. 560, 574. 1 Hale P. C. 515. The St. of 1834, c. 186, § 1, contained the same recognition and proviso. The revised statutes omit that proviso, and leave the question of ownership just as the common law left it. Rev. Sts. c. 120, §§ 27, 29. *Commonwealth v. Stearns*, 2 Met. 343. *Commonwealth v. Libbey*, 11 Met. 64.

4. The judge erred in admitting evidence of other alleged embezzlements, committed by the defendant from one to six years prior to that charged in the indictment, even for the purpose of proving the intent of that specific act. Rosc. Crim. Ev. 81. 1 Greenl. Ev. § 52. 1 Phil. Ev. (7th ed.) 178. Foster, 245. 2 Russell on Crimes, (7th Amer. ed.) 772. They were independent acts, and not "parts of one continued or continuous transaction;" *Regina v. Bleasdale*, 2 Car. & K. 765; *Rex v. Voke*, Russ. & Ry. 533; *The King v. Ellis*, 9 D. & R. 174; *Commonwealth v. Wilson*, 2 Cush. 590; Best on Ev. 32, 96, 97, 285, 286; nor "intermixed" with the act charged; *The King v. Wylie*, 1 New Rep. 92; nor "essential links in a chain of facts needful to be proved" in the case on trial; *Rex v. Salisbury*, 5 Car. & P. 155; 2 Russell on Crimes, 776; nor a wholesale joinder of contemporaneous offences; *Rex v. Mogg*, 4 Car. & P. 364. Evidence of other acts with considerable latitude of time is admitted in cases of forgery and counterfeiting to prove the guilty knowledge, but never to prove the intent, for in those cases intent is an intendment of law. *Regina v. Marcus*, 2 Car. & K. 356. *Regina v. Hill*, 8 Car. & P. 274. *Regina v. Cooke*,

8 Car. & P. 582. *Rex v. Mazagora*, Russ. & Ry. 291. And see *Barton v. State*, 18 Ohio, 221. But even to prove knowledge, three months is the longest recorded period. *Rex v. Ball*, Russ. & Ry. 132. *Regina v. Oddy*, 5 Cox C. C. 210, and 2 Denison, 264. *Rex v. Smith*, 2 Car. & P. 633. These facts were not part of the defendant's confession. *The Queen's case*, 2 Brod. & Bing. 297. *Rex v. Jones*, 2 Car. & P. 629. Rosc. Crim. Ev 55, 81. *Willis v. Bernard*, 8 Bing. 382.

5. The rulings of the court in regard to the defendant's intent and purpose at the time of the alleged conversion amounted to an instruction that every conversion made without formal claim of right is a fraud, and that from this conversion the intent to defraud must be inferred. Every conversion of corporate funds by its treasurer is not fraudulent; for he may take such funds and secrete them without embezzlement; and do this with a fraudulent intent and yet not be guilty of embezzlement. Rev. Sts. c. 126, § 29. Mere taking or conversion, then, is an act indifferent in itself. In such cases criminal intent is not implied by law; but the intent must be proved and found. *Rex v. Woodfall*, 5 Bur. 2667. Where the actual effect of the act is to defraud, the jury may infer intent to defraud. Rosc. Crim. Ev. 21, and cases there cited. But intent must always be proved as well as every other material fact charged, either by evidence or by inference of law. 3 Greenl. Ev. § 13. Where fraud and injury must necessarily follow the act, as in forgery, the intent may be presumed from the act itself. *Rex v. Farrington*, Russ. & Ry. 207. *Regina v. Philp*, 1 Moody, 263. Rosc. Crim. Ev. 20, 21. The ruling of the court excluded all evidence of intent. *Regina v. Phetheon*, 9 Car. & P. 552.

6. The defendant's prayers for instructions should not have been refused. One doctrine involved in them, and overruled, is that there was and can be no embezzlement, because there was no demand of the money, no denial of the receipt of it, and no false account given. *Rex v. Jones*, 7 Car. & P. 833. *Regina v. Creed*, 1 Car. & K. 63. *Rex v. Hodgson*, 3 Car. & P. 423. *Rex v. Smith*, Russ. & Ry. 267. Another doctrine involved in one prayer, and overruled, is, that in every embezzlement there must

be some false entry, or false statement, or an express or implied refusal to account. *The King v. Taylor*, 3 Bos. & Pul. 596. *Rex v. Hall*, Russ. & Ry. 463.

G. W. Cooley, (County Attorney,) for the Commonwealth.

MERRICK, J. The defendant was tried in the municipal court upon a charge of having committed the crime of larceny by the embezzlement of money which came into his possession and was under his care by virtue of his employment as the treasurer of the Eastern Railroad Company. This transaction consisted in the alleged fraudulent conversion of five thousand dollars belonging to that corporation, drawn from the Merchants' Bank on the 26th of June 1855 by a check for that amount signed by him in his official capacity. The jury returned a verdict that he was guilty of embezzling bank bills to the amount and value of two thousand dollars, in manner and form as set forth in the indictment. To many of the rulings of the presiding judge he alleged exceptions; and the questions of law to which they relate are now before this court for revision and final determination.

1. One of these exceptions lies at the foundation of the prosecution against the defendant. It rests upon the denial that at the time of the alleged embezzlement he was in any such employment, or held any such office, as would enable him to commit the offence. In one of the prayers for special instructions to the jury, the judge was asked to rule, that the treasurer of the Eastern Railroad Company, in regard to money and funds under his control and administration, including such funds as were deposited or drawn on the 26th of June, was not such an officer or agent of the corporation that an indictment alleging embezzlement of its property could be maintained against him. If this rule had been adopted by the court, it would necessarily have ensured the acquittal of the defendant; for it asserts that the provisions of § 29 of c. 126 of the Rev. Sts., under which he was indicted, is inapplicable to any person holding the office of treasurer in a railroad corporation; and that no misappropriation, or conversion to his own use, of the money or property intrusted to him in his official capacity, however fraudulent or

dishonest, and with whatever intent or purpose it may have been done, would or could constitute the crime of embezzlement. But the court declined to accede to this request of the defendant, and on the contrary ruled that the prohibition and penalties of this section of the statute extended to such officers, and that they were clearly embraced in the terms in which its provisions were expressed.

In the argument of the counsel in support of the exceptions no great reliance was placed upon this objection. Indeed we are not sure that it was not their purpose to waive it altogether. But we do not feel at liberty, in a matter of so great importance, wholly to overlook and disregard the objection on this ground alone, since if it could be maintained it would be fatal to the prosecution.

That part of the statute under which the defendant is indicted provides that if any officer, clerk, agent or servant of any incorporated company shall embezzle or fraudulently convert to his own use, or shall take or secrete with intent to embezzle or convert to his own use, without consent of his employer or master, any money or property of another which shall have come into his possession, or shall be under his care, by virtue of such employment, he shall be deemed by so doing to have committed the crime of simple larceny. *Rev. Sts. c. 126, § 29.* The treasurer of a railroad company is an officer distinctly recognized by law. He is to be chosen by the directors, and is required to give bond for the faithful discharge of his trust in such sum as the by-laws of the company shall require. *Rev. Sts. c. 39, § 49.* Being therefore within the very words of the statute, he must be considered as liable to the penalties prescribed for its violation, unless upon some reasonable principle of interpretation he is not to be accounted as one of the several parties against whose misconduct it was the object of the legislature to provide guards and security. It would certainly seem, not less from the course of legislation on the subject, and the mischief to be provided against, than from the literal meaning of the words of the statute, that the treasurer of a railroad corporation is comprehended in one of the classes of persons who, by a fraudulent conversion of prop

erty entrusted to their care, are to be deemed to have thereby committed the crime of larceny. The twenty-ninth section of c. 126 of the Rev. Sts. is a reënactment of the provisions of the *St.* of 1834, c. 186. But there is one significant and decisive change in its phraseology. While the former is only in general terms, the revised statutes mention particularly the "officers and agents of any incorporated company" as parties to whom its provisions shall extend. They were specially mentioned probably to remove any doubt which might be entertained upon the question whether they were embraced in the more general language of the former statute. The commissioners by whom the revision was made do not appear to have intended to enlarge or change the class of persons by whom embezzlement might be committed. Nothing of that kind is alluded to in their notes. Commissioners' Report of 1835, c. 126. This specific change in the language of the former statute only makes it certain that every officer of an incorporated company, to whose care property is entrusted by his employer, occupies a position in which he is to be considered capable of committing acts of embezzlement, and liable to the penalties which the law has assigned as the punishment of the offence.

The only consideration which has ever, as far as we know, been suggested as having a tendency to show that upon a true interpretation of the statute treasurers of incorporated companies are not comprehended under the general term of "officers" who are made liable to its penalties is, that on account of their peculiar employment and the nature of the duties they are required to perform, they are necessarily themselves the masters of all the property of which they come into the possession or have the care, and that they cannot therefore either embezzle, secrete or fraudulently convert it without the consent of their employer or master. This is a mistake; no such difficulty exists. To some extent it is true that a treasurer, being a keeper of cash and responsible for it, has for the time being the exclusive right of possession, control and disposal. Unless he is restrained by some rule prescribed for the government of his official conduct, or by the orders of those to whom in the dis-

tribution of the powers and duties of the corporation for whom they all act he is made subordinate, he may keep the money, of which he obtains possession by virtue of his office, in the manner and in the place which he shall himself prefer — in any place where under a sense of his responsibility he may consider it, however erroneously, the most secure and the most readily available for any purpose to which those to whom it belongs shall devote it. But in doing this he is only executing a trust. He is not managing anything which is his own, but only controlling, within the legitimate limits of his official authority, for the benefit of the owner by whom he is employed, the property entrusted to his care. And in this particular, excepting merely the kind, and it may be the value, of the property respectively possessed, his powers, duties and obligations do not in the least degree differ from the powers, duties and responsibilities of the clerks, agents and servants of the same employer. They are severally, for the time which they hold possession of anything committed to them to keep, as much masters of it, as he in the same sense is master of the money with which he is entrusted. Both and all of them are to act, in their several relations, with strict fidelity to their employer; and every species of property is to be kept by them respectively upon the terms and according to the directions given them concerning it. The clerk who has the custody of books and papers, the agent to whom is given the general control of all the effects of his principal, the servant who in a more limited sphere is entrusted with goods for any specific purpose, has each within the circle of his authority a right of control as clear and absolute as that of the treasurer in the discharge of the duties which devolve upon him in a higher and more responsible department of service. They are therefore all alike included in the scope and purposes, as well as in the literal meaning of the comprehensive words of the statute. And surely, if there be any reason to discriminate between different ranks and classes of service, to no one of all those who may be in the employment of a corporation, of copartners or of individual proprietors, can there be a higher reason or more stringent occasion for applying the

restraint of penal laws to insure fidelity than to him who is specially entrusted with the care of money. Of every species of property, this is the most easily concealed, misapplied, converted to use and embezzled. Being at all times available for the purposes either of business or of pleasure, it presents more than anything else a temptation to misuse. Whether therefore the mischiefs to be guarded against, the temptations to be restrained, or the express words of the statute, are considered, it is equally apparent that treasurers of railroad corporations, as well as of other bodies politic, to whose care any kind of personal property is specifically entrusted by their employers to be kept for them, are to be accounted officers, within the meaning of that term as it is used in the particular section of the statute prescribing the punishment of embezzlement.

2. As we thus find that the defendant occupied a position in which he was capable of committing the offence charged against him in the indictment, we are brought to a consideration of the several rulings of the presiding judge which are complained of as erroneous.

In the first place the defendant insists that all the evidence concerning the confessions supposed to have been made by him to John B. Parker and to Samuel Hooper, which was produced by the government in support of the prosecution, ought, upon his objection thereto, to have been rejected, because they were not, in a legal sense, voluntary confessions, but were evoked from him by promises of favor, held out to induce him to acknowledge himself guilty of embezzling the money of his employers. If he was right in the fact which he thus alleged, there can be no doubt that the objection which he predicates upon it ought to have been allowed to prevail; for no legal proposition is better established than that upon which the objection rests. It is certainly a clear as well as familiar principle of law, that every free and voluntary confession is admissible in evidence against a party accused of any criminal offence; but that all those which are obtained from him by threats of harm, or promises of favor and worldly advantage, held out by a person in authority, or standing in any relation from which the law will

presume that his communications would be likely to exercise an influence over the mind of the accused, are to be excluded from the hearing of judicial tribunals. This is in conformity with the whole current of authorities on the subject. 1 Greenl. Ev. § 219. *Commonwealth v. Knapp*, 9 Pick. 507, and 10 Pick. 489. 2 Bennett & Heard's Lead. Crim. Cas. 184 & seq. Rose. Crim. Ev. 29. Doubts have sometimes been expressed both as to the expediency of the rule, and the extent to which in particular instances it has been allowed to be carried; but no one thinks of breaking in upon or attempting to disturb it. *Regina v. Baldrey*, 5 Cox C. C. 523. "The ground," said the chief justice of this court, "on which confessions made by a party accused, under promises of favor, or threats of injury, are excluded as incompetent, is, not because any wrong is done to the accused, in using them, but because he may be induced, by the pressure of hope or fear, to admit facts unfavorable to him, without regard to their truth, in order to obtain the promised relief, or avoid the threatened danger, and therefore admissions so obtained have no just and legitimate tendency to prove the facts admitted." *Commonwealth v. Morey*, 1 Gray, 462, 463.

It does not appear from the bill of exceptions that any doubt whatever was entertained by the court, upon the trial of the defendant, concerning his right to have the full benefit, advantage and protection of this rule of law, or that any controversy arose or existed concerning it. But there was a question of fact which was debated by the parties; and this was, whether the communications of the defendant to Parker and to Hooper were free and voluntary disclosures, or were drawn out by promises of favor held forth to induce him to make an acknowledgment of his guilt. In relation to the testimony of Parker, it is distinctly stated in the bill of exceptions that the court determined that the facts disclosed by Reed were insufficient to exclude the proposed evidence of the defendant's confessions upon the ground that they were made under the influence or in consequence of any promises of favor. And although nothing is specially said upon this subject in relation to the testimony of Hooper, we think it is very ap-

parent that it was held to be admissible solely upon the ground that there was no sufficient proof before the court of any such antecedent promises as would justify its exclusion. Indeed, all this is substantially conceded; for in the argument in support of the exceptions it was not suggested that there was any failure on the part of the court to recognize this principle of law, or any refusal to apply it in what was admitted to be a proper case, but that it was erroneously determined upon the evidence that no promises of favor were held out to induce the confessions of guilt upon which the government relied in support of the prosecution.

The question then recurs whether that adjudication was correct. This is to be determined upon a consideration of the evidence which was before the court when that question arose, and cannot be settled by a mere reference to judicial authorities. These can only supply the principle of law which is to constitute a uniform standard of decision; but in every case the admissibility in evidence of confessions must depend upon the peculiar state of facts and circumstances under which it is offered.

To show that the confessions of the defendant to which the testimony of Parker relates were not free and voluntary communications, but were educed from him under the pressure of hopes excited by promises of favor, the defendant relied at the trial, and still relies, upon the facts disclosed by Reed in his examination upon the preliminary question. It appears from this examination that on the evening of the 27th of June 1855 the defendant went, in company with his wife, and certainly after consultation with her in relation to the objects of his visit, to the residence of his friend Reed in Lynn, to make a disclosure of the trouble in which he was involved, and to solicit advice concerning it. After he had, in language the substance only of which is stated, admitted that he was a defaulter in his official capacity as the treasurer of the Eastern Railroad Company, Reed said to him that "he had better go to the directors and make a clean breast of it;" "that it would be for his interest to go and confess all;" "to go and make a full confession;" that "he had better go and make a clean confession and

a clean breast of it." It is insisted that these expressions, to which it appears that Reed repeatedly gave utterance, were calculated to encourage the defendant to confess, to excite in his mind hopes of relief and advantage if he yielded to that advice; and that he must have considered them to be, and that they were in fact, promises of favor held out as inducements to influence him in the course of conduct he should pursue. Such might, and perhaps would, be the necessary and legal consequences of these exhortations of Reed, if they were to be considered without reference to the circumstances under which they were made, and to whatever else was said at the same time, tending to limit, explain and qualify their meaning. The accompanying circumstances are never to be lost sight of in determining whether proof of confessions alleged to have been made shall be received. Thus, if an accused party has been made a prisoner, anything which may be said to him by the officer by whom he is held in custody will always be scrutinized with the greatest care, and slight promises of favor coming from him will be considered a sufficient reason for rejecting all proof of subsequent confessions. *Commonwealth v. Taylor*, 5 Cush. 605. But the defendant was not under arrest, and no charge had been brought or complaint made against him at the time of his interview with Reed. From the responsible position which he occupied, as the treasurer of a great railroad corporation, it is impossible not to regard him as a person possessed of at least the ordinary degree of intelligence, and quite capable of appreciating the force and effect of the whole conversation which then took place. And in looking at the bill of exceptions, it is very plain that, in addition to the expressions which have already been quoted, much was said by Reed by which they were materially qualified. Thus he states that he "said nothing, in terms, of a prosecution;" that he told the defendant "to commit no violence on himself, nor run away; that the disgrace was in doing wrong, not in suffering punishment for it; he had better stay and meet the punishment;" and finally, that he "advised the defendant as a friend and as a son." Now it is impossible, taking all this together, to consider that any prom-

ise of favor was held out to the defendant as an inducement to confess his guilt. But there was a consultation between the parties; and the defendant, at the conclusion of their conversation, obtained all that he went to solicit from his friend. It was advice how he should conduct himself in the emergency into which he had fallen, that he particularly sought for; and that advice was given generally, upon the broad ground of right and expediency; and though pressed with an earnestness corresponding with the importance of the occasion, Reed did not presume to accompany it with any assurance of protection or any promise of favor or relief. And it was obviously understood in this light by the defendant; for at that time he declined to reply in any detail to the inquiries which were urgently, though kindly, pressed upon him; and he reserved to a future occasion the determination whether he would make the frank and full communications to which he was exhorted. This was all the evidence, when the testimony of Parker was offered, which was before the court to show that any promise of favor had been made or held out to the defendant; and as it fails to prove that fact, it was rightly held that there was no sufficient ground upon which it could be excluded.

Nor does it appear from the testimony of Hooper that, previously to making those confessions to him, which the government proposed to put in evidence, any promises of favor or assurances of safety or relief had been held out to the defendant to bias or disturb his judgment, or to influence his conduct or course of action. When they met in the morning after the interview with Reed at the office of the latter, Reed urged the defendant to make a full confession; tried very hard to make him do so; and amongst other things said that Hooper had influence with the directors, and would see that he was not complained of or arrested. But here Hooper interposed, and told Reed to stop, and declared that he would make no promises whatever. And although he afterwards said to the defendant, that he had no vindictive feelings towards him, and intended to do whatever was right and proper for him to do to prevent his arrest or the institution of a prosecution against him; yet he cautiously and repeat-

edly added, that he did not know the extent either of his power or of his duty ; but that at all events he would enter into no stipulations with or make any promises to the defendant, who, in revealing or fully developing the particulars of his defalcations, must confide wholly in him ; and that he should in every respect, without embarrassing himself by any previous engagements, do precisely as his own judgment and discretion should direct him. This is too clear and explicit to admit of any doubt, either as to what was said, or as to the import and meaning of what was said. Not only were no promises of favor made ; but the defendant was repeatedly warned, in substance, that none would or could be made, and that he must decide for himself whether he would disclose or withhold the information he was desired to communicate. He afterwards did confess, and gave to Hooper for the directors a detailed written statement of the various sums of money which he had on different occasions abstracted from the company's treasury ; not, as there is any reason to suppose, under the influence of a promise of favor which had, or which he supposed had, been made to him ; but rather in a confidence entertained in his own mind, and probably well founded, that what he might do in future would mitigate the resentment or disapprobation of those whom he had injured, and thus secure to himself protection and relief. The judge determined, and we do not see how he could have come to any other determination, that evidence of the confessions which ensued was admissible.

3. The defendant further excepted, and now objects, to the ruling of the presiding judge, that, if money which belonged to the Eastern Railroad Company was deposited in the Merchants' Bank by the defendant to his own credit as treasurer of the corporation, and he afterwards in that capacity drew his own check upon the bank therefor, and received the amount of it in bills, those bills, while in his hands as treasurer, were the property of the corporation, and might be embezzled by him. And this objection is attempted to be supported upon two grounds : first, that the defendant, though bound by law to apply that amount of money to the use and service of the corporation, was not

required absolutely to apply those identical bills for that purpose; and secondly, that the relationship between him and the corporation was such that his possession gave them no ownership of the money or coin which he drew from the bank. As to the first of these reasons, it may be assumed as true that, if unrestrained, as in this instance he appears to have been, by positive instructions on the subject, the treasurer might lawfully change the money which came into his hands, whenever and as often as he should choose to do so; but the consequence contended for by no means follows from the exercise of that right or privilege. The change of one parcel of bank bills for another parcel, or for their equivalent value in any species of currency, can have no effect upon the rights of the parties in relation to the question of ownership; for of whatever the money, which for the time being is in the hands of the treasurer of a railroad company and held by him on their account, may consist, it always, and in every shape, belongs to his principals. He is at all times the keeper of their property, and never, whatever its form may be, can rightfully set up any claim of ownership to it in himself, in opposition to them. He cannot cease to hold it in trust, so long as he holds it at all. Here it is admitted, in the very terms in which the exception is stated, that the money which was deposited in the bank belonged to the corporation. They had therefore a perfect right to draw and use the amount deposited as their own; and it could be drawn only upon the order or check of their treasurer. When it was so drawn, the bills received could no less be theirs, than were the bills or coin placed on deposit, and for which by this course of proceeding they would have been virtually exchanged. And this shows that there is no foundation for the second reason urged in support of the exception. The relationship of the parties to each other is not that of debtor and creditor; nor does it arise from a contract that one of them shall collect and receive money belonging to the other, and thereupon account for and pay it over to him; or that one shall pay over to the other the proceeds of property which he has been authorized and employed to sell for the owner; as in the cases of *Commonwealth v. Stearns*, 2 Met. 343, and *Com-*

monwealth v. Libbey, 11 Met. 64, cited by the counsel for the defendant. But, more than this, he is exercising a trust which is not only faithfully, but specifically, to be observed and kept. As an officer of the corporation, whose especial duty it is to hold, manage and control their funds, whenever money belonging to his principals comes into his possession, he must hold it in his fiduciary character, having no further right to or interest in it than that which is sufficient to enable him to discharge his duty to the owner by whom he has been intrusted with its possession. The ruling of the court upon this subject appears therefore to have been perfectly correct.

4. The next exception of the defendant is founded upon the general and well established rule that in all trials, and especially in every criminal trial, the evidence must be confined to the proof or disproof of the precise point in issue. And it is undoubtedly true that the prosecutor is commonly to be restrained from proving the commission by the accused of other distinct offences, for the purpose of showing that he is guilty of that which is specially charged against him. The defendant objects that this rule, which was of the greatest practical importance to him, was directly disregarded upon his trial; and that if it had been properly enforced, all the evidence which was admitted respecting acts of alleged embezzlement of property belonging to the Eastern Railroad Company, other and distinct from those set forth and charged against him in the indictment, would have been excluded.

To form a correct opinion upon the question whether this evidence was admissible, it is necessary to take notice, in the first place, that it was confined to a special and designated class of facts, having, as it was alleged, and as it was understood by the court, a peculiar and intimate, if not also an inseparable, connection with, and tending to explain and characterize, the material act in issue which was charged against the defendant; and secondly, that it was allowed to be laid before the jury for the sole purpose of showing that the money alleged to have been embezzled was taken and appropriated by him with a fraudulent intent. The counsel for the government proposed to enter upon

a much broader field of inquiry, and to prove, without limitation, the commission of distinct and independent acts of embezzlement during the period between six months and four years next preceding the commission of the act charged in the indictment. But he was not allowed to do so. In the strict application of the rule, that no evidence inapplicable to the precise point in issue is admissible, all the proofs which he offered in relation to those remote and independent facts were rejected. But there was another class of facts of an entirely different character. It had already appeared in the progress of the trial, from the testimony of Hooper, that the defendant, in giving an account of his dealing with the funds of the corporation, produced and delivered to him a detailed statement in writing of the various sums of money which he had, after receiving them in his official capacity, wrongfully abstracted from the treasury, and for which he was then a defaulter. This paper had been produced in evidence. One of the items found upon it was the same sum of \$5000, the embezzlement of which was set forth and charged against the defendant in the indictment. This item and all the items contained in the paper were explained by him to Hooper to be a statement of the different amounts of the property of the corporation which he had appropriated to his own use. All these various circumstances appeared to the court below to have a tendency to prove that the misappropriation of this sum of \$5000 was one of a series of connected transactions, and that the whole series would tend to show the intent of the defendant in doing the particular act which is made the subject of accusation against him in the indictment. There may be a difference of opinion as to the effect of this evidence, of the inferences to be drawn from it, and of its sufficiency to prove the occurrence of a series of connected transactions, and the guilty intent of the defendant in them all, which it was the object of the government to establish by its introduction. But it is enough that it had a tendency to show these important facts. The intent and purpose of the defendant, in the withdrawal of the sum of \$5000 from the treasury of the corporation, and in the disposal and appropriation which he made of it, was an essential matter

of inquiry in relation to the issue to be tried. His alleged guilt consisted not merely in the conversion of the money, but in its fraudulent conversion to his own use. Hence it was competent for the government to introduce evidence of any facts tending directly to show his fraudulent intent, or from which that intent might justly and reasonably be inferred. It was in this view, that the government was permitted to lay before the jury proof of the embezzlement by the defendant of the several sums of money mentioned in the written statement which constituted a part of his confessions to Hooper. In relation to each and all of these several sums of money, if his conduct, motive, purpose and intent ought not to be considered to be by him confessedly of the same character, yet it is clear from the testimony of Hooper that, in the full explanations afforded in the course of his confession, the defendant himself did not indicate or suggest any distinction between them, but brought them all together in one general statement of his defalcations. If his intent in relation to all of them was precisely the same, then if in reference to any of them it was shown to be fraudulent, all would be shown to be fraudulent, and thus a particular fact material to the issue would be satisfactorily established. Considered in this aspect, it will be seen that the admission and exclusion of all the evidence, produced or offered by the government concerning transactions other than those mentioned in the indictment, were both regulated, not in disregard, but in strict recognition, of the rule requiring it to be confined to the proof or disproof of the point in issue. Thus all the proof which was offered in relation to transactions not intimately and directly connected with the particular accusation against the defendant, or with the evidence, or in necessary explanation of the evidence, adduced to establish it, was carefully rejected. But, on the other hand, transactions which had that intimate connection were permitted to be shown, because they tended to develop and expose the fraudulent intent of the defendant in converting to his own use the \$5000 which he is charged in the indictment with having embezzled, and thus to sustain one of its essential allegations. This was perfectly right. Where the intent of the accused party forms any part

of the matter in issue, evidence may always be given of other acts not in issue, provided they tend to establish the intent imputed to him in committing the act. *Rosc. Crim. Ev.* 71. The same proposition is stated, though in somewhat different language, by Archbold. *Archb. Crim. Pl.* (10th ed.) 112. This rule is always recognized. It is uniformly acted upon in criminal trials, whenever an occasion arises for its application.

Thus where a party was tried upon an indictment for the crime of adultery, evidence of three instances of improper familiarity between the prisoner and his supposed paramour, one of which occurred within a fortnight and the others within a year next preceding the particular act complained of, was held to be admissible; and this manifestly for the purpose of showing the intent of the parties when they met in secret, so that no direct evidence of their conduct there could be expected to be produced. And in delivering the opinion of the court, it was said by Putnam, J.: "Evidence should be excluded which tends only to the proof of collateral facts. But it should be admitted if it has a natural tendency to establish the fact in controversy." To which he immediately adds: "It was argued that the defendant was not to be put upon his trial for every act of his life, but for a particular offence. Be it so; if the evidence which was received has a natural tendency to corroborate other direct evidence in the case, it would seem to be clearly admissible." *Commonwealth v. Merriam*, 14 Pick. 519, 520.

In the case of *Commonwealth v. Eastman*, 1 Cush. 216, this principle of law was not only fully recognized, but its decision afforded an opportunity for a clear exposition of the occasions upon which it may be availed of, and of the reason upon which it is founded. The defendants were indicted for obtaining goods and merchandise, by false pretences, of certain persons named in the indictment. On the trial evidence of purchases of goods from other persons, under circumstances similar to the transactions charged in the indictment, was offered in support of the prosecution. It was objected to, but admitted. In stating the opinion of the court, after an elaborate argument by the counsel for the defendants, it was said by Dewey, J.: 'This species

of evidence would not be admissible for the purpose of showing that the defendants had also committed other like offences; but simply as an indication of their intention in making the purchases set out in the indictment." "Such evidence is always open to the objection that it requires the defendant to explain other transactions than those charged in the indictment; but when offered for the limited purpose of showing a criminal intent in doing the act charged in the indictment, it has always been held admissible." See also *Commonwealth v. Miller*, 3 Cush. 250.

These authorities abundantly establish the principle contended for on the part of the government. It is not indeed denied by the counsel for the defendant; but the objection urged to the admission of evidence concerning other acts of embezzlement beyond that immediately charged in the indictment rests wholly upon the rule that it ought always to be confined to the precise point in issue. But in the position of the case, when during the progress of the trial evidence of some such transactions was offered, the government had become entitled, not in disregard or in violation of that rule, but upon another distinct principle, to avail itself, to the extent which was authorized by the court, of proof concerning those particular transactions which the defendant by the manner and form and peculiarity of his confessions to Hooper had made pertinent, if not indeed indispensable, to a true exposition of his intent in using the particular sum of money alleged in the indictment to have been embezzled. The evidence was therefore properly admitted.

5. In reference to the general crime of embezzlement, the jury were instructed, that if the defendant, acting as treasurer, took the money of the corporation which had been entrusted to him, and used it for his own purposes, knowing that he had no right to do so, and did it without the consent of the company or of any of its officers, and concealed the transaction from them, this amounted to a fraudulent conversion of the money of the company, even though at the time of taking it he intended to restore what he had so appropriated, before the appropriation should become known to its owners, and believed that he should be

able to do so, and had in his possession property to secure the full amount of the property so taken. This instruction is objected to by the defendant for the assigned reason that it amounts to a statement, that every conversion made without a formal claim of right is a fraud; and that from any and every conversion fraud is necessarily to be presumed; and that therefore the question whether the defendant was actuated by a fraudulent intent was substantially and improperly withdrawn from the consideration of the jury.

Embezzlement of property by officers, clerks, agents and servants is fully defined by the statute, which creates the offence and provides for its punishment. A fraudulent intent is made a constituent and an essential part of the offence. Without it there may be misconduct, but there will be no criminality. The question therefore whether any particular act of conversion was infected or accompanied by a fraudulent purpose is a question of fact to be passed upon by the jury. But the submission of that question to their determination ought to be accompanied with suitable instructions in the matters of law which pertain to it. This being done, it may be sufficient to leave them to find whether there was or was not any fraudulent intent, in the legal sense and meaning of that phrase, and according to the definition of it which may have been given to them; or whether they are reasonably satisfied of the truth of certain enumerated facts and circumstances from which a fraudulent intent, is a direct and inevitable inference. It is very plain that the latter was the course pursued upon the trial in the present case. For although in one part of his charge the presiding judge stated most explicitly that to establish the charge against the defendant the government must make out a fraudulent taking and conversion, and explained satisfactorily the nature of fraud and in what it consists, yet in conclusion the jury were advised that the actual conversion by the defendant to his own use of money belonging to his employers, which they had entrusted to him in his official capacity, doing this without their consent, and knowing that he had no right to do it, and concealing it from them, would amount to a fraudulent conversion. The question therefore, plainly

stated, is, whether from the facts and circumstances to which the attention of the jury was thus called and directed a fraudulent intent in the taking and conversion of the money is the only just and reasonable inference which can be deduced. In fraud there is always some kind of deception. And a fraud may be defined to be any artifice whereby he who practises it gains, or attempts to gain, some undue advantage to himself, or to work some wrong or do some injury to another, by means of a representation which he knows to be false, or of an act which he knows to be against right or in violation of some positive duty. All these elements and characteristics of fraud are embraced in the hypothesis which was put to the jury, and upon which the final instructions given to them, and now objected to, were founded. The appropriation to his own use by the defendant of money belonging to the corporation, which came into his possession by virtue of his office and employment, and was thus entrusted to his care, was an unlawful act. It was a breach of trust; and, upon the supposition that he well understood that he had no right so to dispose of it, was a wilful violation of his duty. He unjustly gained thereby an undue advantage to himself in the accomplishment of objects purely selfish and personal, by applying to his own individual purposes the property of others, which he ought faithfully to have kept and preserved exclusively for them. He committed a wrong against his employers by secretly substituting his own mere personal credit and liability in the place of the specific property which they had entrusted to his care, and thus subjected them to a risk and hazard of loss which they had never consented or intended to assume. And by concealing the transaction from their knowledge, he practised upon them a preconceived and intentional deceit. For concealment, in the connection in which it was spoken of by the court, necessarily imports the execution of some plan previously arranged, or of some design which had been cautiously premeditated. This is not merely that he was still and silent, or omitted to publish or disclose what he had done; but involves by necessary implication the idea, that he had deliberately resorted to the active employment of means,

which he believed would be effectual for that purpose, to secrete and hide from his employers the fact of his defalcation, in order that he might escape with impunity from its consequences. How, or in what manner, he effected that concealment, or whether any evidence was adduced upon the trial, which would warrant the conclusion that it was in fact in any way effected it is not now material to consider or inquire. It might have been by false entries upon the books of the corporation, or by the failure to make any entry upon them at all; or by representations known to be untrue; or by any device resorted to for the purpose of disguising the truth from the knowledge of his employers, and thus inducing them to rest in a false security. All these were proper subjects of inquiry and investigation upon the trial before the jury. We are confined here to the question whether the rule of law which was laid down for a guide to them in their deliberations was correct. And in this point of view it is obvious that the actual use of means in conformity to some scheme devised to conceal the unlawful appropriation of their money from his employers directly imports and evinces a purpose to mislead and deceive them. But no single circumstance is alone to be taken into consideration. The several acts enumerated as parts of the hypothesis upon which the instructions to the jury were predicated, embracing the conversion by the defendant of the money of his employers, the known violation of duty thereby, the evident advantage gained for himself, the injury inflicted upon his employers, and some of these objects accomplished by artifice and deception voluntarily practised, were respectively unlawful; and taken altogether as one general fact, though consisting of several, but a connected series of, transactions, they constitute an act of positive fraud. And he by whom these acts were done must be presumed to have contemplated and intended the natural and probable consequences of his own well understood misconduct. And since the intention by which a party is actuated in any particular transaction must be presumed to participate in the nature of that transaction and of the various acts by which it is consummated, the inference must be inevitable that

the perpetrator of a fraud commits it with a fraudulent intent. This result shows that the law was rightly stated and explained in the instructions to which exception is taken. These instructions were predicated upon the facts embraced in the hypothesis laid before the jury; and as the doing of the acts therein mentioned was fraudulent, the motive and intent with which they were done were fraudulent also.

This result cannot be affected by the consideration, if it be admitted to be well founded, that the defendant, at the time of taking and converting the money to his own use, intended to restore it to the owners before his appropriation of it should become known to them, and believed that he should be able to do so, and had in his possession property to the full amount of the money which was taken. The intention to take, and the intention at some future time to make restitution, may be two different operations of the mind, just as the taking of money at one time and the repayment of it at some subsequent period are two distinct transactions. But even if it can be supposed that these two purposes, having in view the accomplishment of objects entirely distinct from each other, may be so blended together, by being contemplated at one and the same moment, as to be absolutely inseparable, still it is undeniable that the execution of them can be worked out only by successive acts, with some intervening space of time between them. The abstraction must necessarily precede the restitution. The first will be complete before there is a possibility of commencing the act by which it is to be followed. And thus, whatever it may be the purpose of a guilty party ultimately to do, the offence prohibited by the statute will already have been consummated whenever, after the commission of all the other acts of which it consists, a fraudulent conversion of property shall have actually taken place. And even if it be necessary to go the length of affirming that there can be no embezzlement except where money or property is taken with an intention never to return to the owner that which is taken, the actual use and conversion of money will cover and comprehend that proposition. For as an entrusted agent, servant or officer can convert to his own use the

money of his employer only by passing it out of his hands and delivering it with the right of property to some other person, since, so long as he remains in possession of it, it will continue to be the specific property of his principal, he necessarily loses all control of it by such an unlawful conversion, and can never afterwards by his own mere power and motion bring it back. The past is complete and unchangeable; and as to the future he is dependent upon the will of others and upon circumstances over which he cannot exercise an absolute control. The intention to abstract the money and appropriate it to his own use has been fully executed; the intention to indemnify and do justice to the party from whom it has been withdrawn remains unexecuted, and may finally, however conscientiously entertained, be altogether defeated. Conversion bears nearly, if not quite, the same relation to embezzlement, as asportation does to the crime of larceny. Yet no one would doubt but that the commission of the latter crime would be fully consummated if a person, possessed of abundant means to afford and ultimately to insure a complete indemnity to the owner of stolen property, if applied to that purpose, should, under the pressure of some present necessity for money, go furtively into his neighbor's shop, and carry away from there a parcel of coin or bank bills found there, although the act were accompanied with an intention to return as much at an early, but yet at a future, day, to be put in its place before the money should have been missed or the trespass become known. That which must always qualify and characterize the act is the intention of the party when he takes or converts to his own use the property of another person. If the intention be to use and enjoy the thing taken for some brief period, and then to abandon or restore it to the owner in the identical form and condition in which it was taken, a trespass only may have been committed, however unjustifiable were the means by which the possession of it was acquired; but if the intention be, feloniously in the one case, or fraudulently in the other, to make a full and entire appropriation to his own use, and thus absolutely to deprive the owner of his property, the act, whether of asportation or of conversion, will be criminal,

and is not to be excused or justified by any resolve, however honestly entertained, to make restitution at some future, but indefinite period.

It was in conformity to the principle, thus developed, that the instructions to the jury which are complained of were framed and accurately stated. They were to find the conversion of the money taken by the defendant from the treasury of the Eastern Railroad Corporation to have been fraudulent, if they found the evidence laid before them sufficient to prove the truth of certain alleged facts from which a fraudulent intent was a legitimate and an inevitable inference. Thus under these instructions it must have been made satisfactorily to appear to the jury, before they could have rendered a verdict of conviction, that the defendant, standing in a relation of trust and confidence to his employers, not only unlawfully and in violation of his duty converted their money, entrusted to his official care, to his own use; but that he did it by artifice and deception deliberately practised, and therefore with a fraudulent intent. These instructions then contained a precise description of one of the acts of embezzlement, which are made criminal by the express provisions of the statute; and they were accurately adapted to the particular accusation set forth in the indictment against the defendant.

6. In addition to the various objections which have now been considered and disposed of, the defendant excepts to the course of proceeding upon the trial, and to the refusal of the presiding judge to rule in conformity to many of the prayers for instruction, which were seasonably presented to the court for its adoption. Instead of adopting them, he gave such instructions as he deemed proper for the direction and guidance of the jury. When, as in the present case, at the close of a protracted trial, many prayers for instruction, voluminous and complicated in their structure, are presented to the court by either or both of the parties, it is within the judicial discretion of the judge to respond to them severally, adopting such parts as appear to be correct, and rejecting the residue altogether; or to explain the law wholly in language of his own. And no cause of complaint is thereby afforded, if all the matters propounded in the various

prayers are fully adverted to and explained. No complaint of any omission in relation to them is urged by the defendant; but he insists that the court erred in overruling the doctrine, which he says is involved in his prayers for his instructions, that there can be no embezzlement unless there has been a demand of the money alleged to have been embezzled, or a denial of its receipt, or some false account given of it, or a false statement or false entry concerning it, or a refusal to account for it. If the doctrine so stated be fairly indicated and involved in those prayers, it is clear that they were properly overruled, because it is apparent, from the definition already given, that the several circumstances above mentioned do not in fact constitute any part or element of the offence. They are facts and circumstances admissible in evidence as bearing upon the question of a fraudulent intent; but for all other purposes they are wholly immaterial. And this is all that is shown by the several authorities cited by the defendant to support the doctrine supposed to be asserted in his prayers for instruction. Thus it appears in relation to these prayers that both the refusal of the court to adopt them literally as the basis of its instructions, and the substitution of a different definition of the offence charged against the defendant in the indictment, were correct in point of law and obnoxious to no valid objection.

Exceptions overruled.

NATHANIEL PAGE, JR. vs. THOMAS MELVIN, Executor.

The St. of 1855, c. 283, excepting from the operation of the St. of 1852, c. 294, § 1, (which limited the time of bringing actions against executors and administrators to two years from the filing of their official bond,) any right which had accrued or existed against any deceased person or his executor or administrator prior to its passage, does not revive a right of action barred by the St. of 1852 before the passage of the St. of 1855.

SHAW, C. J. It appears by the report in the present case that the action is on a promissory note not barred by the general

statute of limitations at the decease of the testator. The defendant was appointed executor and gave bond on the 12th of April 1853. This suit was brought on the 18th of June 1855, more than two years, but less than four years, from the time when the executor gave bond.

The defendant relied on the statute of limitations of 1852, c. 292, limiting actions against executors and administrators to two years from the time of giving bond. As the defendant in this case became executor and gave bond after the passage of the St. of 1852, and this action was brought more than two years after the defendant gave bond, it would appear that this was a bar. But the plaintiff insisted that it was saved by the St. of 1855, c. 283. This act was passed on the 2d of May 1855, and by its terms took effect from its passage.

Between the times of passing the two statutes, the case of *King v. Tirrell*, 2 Gray, 331, had been decided, determining that the St. of 1852 could not so far have a retroactive effect as to apply to cases where administration had been taken and bond given before that statute was passed, and where by operation of preëxisting laws the creditor had four years in which to bring his action. In this state of the law the later act was passed. It is uncertain whether the full and authentic report of that case was then published; but the legislature probably had some knowledge that such a decision had been made.

The St. of 1855, which is very short, provides that § 1 of St. 1852, c. 294, "shall not apply, or be construed to apply, to any right of action of any creditor of the estate of a deceased person against the executor or administrator of such person, which had accrued or existed against such deceased person, his executor or administrator, prior to the passage of said act."

By the case of *King v. Tirrell* it was decided that the St. of 1852 could not apply to cases where administration had been taken and bond given before that act passed, because it would be giving it a retroactive operation, which it could not be presumed that the legislature intended. But as that reason would not apply to cases where administration was taken and bond given after the act of 1852 passed, and there was no additional

statute altering or modifying it, the court assumed that in a case occurring after the statute the two years' limitation would apply. Such application would not give it a retroactive operation ; and as an act governing new cases it seemed unobjectionable.

In the present case, administration having been taken and bond given after the act of 1852, the plaintiff endeavored to avoid the two years' bar by relying upon that clause in the *St.* of 1855, which provides that the act of 1852 shall not apply to any case in which the cause of action accrued to the plaintiff before its passage. There is an obscurity in the clause, which renders it doubtful whether the legislature intended to except a case where the cause of action against the executor or administrator accrued to the creditor, or whether it extended to a case where the cause of action accrued against the debtor in his lifetime.*

But there is no necessity, for the purposes of this case, to express any opinion upon this question, because there is another, free from doubt, upon which the court are of opinion that this case must be decided. Letters testamentary were issued and bond given on the 12th of April 1853. The act of 1852 was then in full force. The two years' limitation expired on the 14th of April 1855, some weeks before the passage of the *St.* of 1855. The lapse of this term of limitation, as the law then stood, had become an absolute and complete bar to the plaintiff's action against the executor, and the subsequent statute could not so operate as to remove and take away a bar thus complete and absolute. It is no doubt competent for the legislature to enlarge and extend a term of limitations of actions. This was repeatedly done in regard to the general statute of limitations, which was extended, we think, more than once after the time first fixed for it to go into operation. The legislature may also, we think, prospectively diminish and shorten a term of limitation, by a general statute, provided reasonable time is left between the passage of the act and the time when it is to take effect, to enable all persons concerned to bring their actions.

But it has been held, and we think on satisfactory grounds, that where a statute of limitations has taken effect and become

* See *Thompson v. Burnham*, 18 Gray, 211.

a bar, a subsequent alteration of the law of limitation will not operate retroactively so as to remove such bar. *Wright v. Oakley*, 5 Met. 400. In this case the limitation took effect in the middle of April; the act relied on was passed in May after, and therefore the plaintiff's right of action was barred.

By the operation of the *St.* of 1852, fixing the two years' limitation, the right of action in the present case, upon the construction in *King v. Tirrell*, did not apply to a case where the administration was taken and bond given after 1852, which was the present case, and the action was barred on the 12th of April 1855, before the *St.* of 1855. But the attempt to avoid this result on the part of the plaintiff was that it is within the exception in the statute which provides that the former act shall not apply to a case where the cause of action against the estate of the deceased, his executor or administrator, accrued prior to the passage of the act of 1852, and that this was so, because the cause of action against the deceased during his lifetime accrued before 1852, and therefore it should not apply to this case, in which the cause of action did so accrue. But a majority of the court are of opinion that this is not the true construction, but that the statute means the cause of action accruing against the estate, that is, the executor or administrator, and meant therefore to provide by law what in effect the court had decided, that it should apply to shorten the time of limitation where the executor or administrator had given bond before the passage of the act of 1852. The whole object of both statutes was to fix the time of limitation against an executor or administrator, with no reference whatever to the general statute of limitations, or to the rule of law fixing the time when an action accrues against a living person.

In construing the statute, we consider that this case is not within the act of 1855, because the cause of action against the executor did not accrue before May 1852. Then the action being already barred by the *St.* of 1852, the *St.* of 1855 did not open it, by the description of actions to which it was declared it should not apply; the *St.* of 1852 did apply and did bar the action, and this was not opposed by the statute of 1855.

Eastern Railroad Company v. Benedict & another.

It is said that on this construction the *St.* of 1855 had nothing to which it could apply; but this seems not to be so. It was passed in May 1855, and related to May 1852. Administrations may have been taken between June 1851 and May 1855, under which causes of action had accrued against an administrator before May 1852, and thus could come under the operation of the statute.

Though coming to the same conclusion for different reasons, the court are all of opinion that the bar relied on by the defendant was not removed by the *St.* of 1855, and that judgment is to be rendered for the defendant.

Judgment for the defendant.

C. T. Russell, for the plaintiff.

W. Brigham, for the defendant.



EASTERN RAILROAD COMPANY vs. LEVI BENEDICT & another.

In an action upon an order to deliver stock, if the declaration alleges a demand according to the tenor of the order, the want of any demand cannot be taken advantage of under an answer which only denies the existence and acceptance of the order.

A promise to accept and pay an order for the delivery of stock in a corporation, which the drawee had agreed to pay for certain goods sold to him, is not within the statute of frauds, if those goods have been delivered to him; otherwise, if they have not.

In an action for not delivering stock according to an order which specifies no time of delivery, the measure of damages is the value of the stock when demanded.

ACTION OF CONTRACT to recover damages for the non-payment of the following order:

"September 24th 1850. Messrs. Benedict & Warren, Salem, Mass. Gentlemen: Please give Mr. D. A. Neale, President of the Eastern Railroad Company, stock in the Salem Gas Light Company at par to the amount of seven thousand dollars, and place the same to my account.

Yours respectfully,

"Leonard Fuller."

The declaration alleged an acceptance and promise to pay

the order, and a demand made according to its tenor. The answer put in issue the existence of such an order, and denied any acceptance thereof or promise to deliver stock under it. After the adjudication, reported in 5 Gray, 561, that these plaintiffs could bring the action, a trial was had before *Merrick, J.*, who reported the following case for the decision of the full court :

“ The plaintiffs offered no evidence tending to show a demand for the delivery of the stock mentioned in the order, before bringing the action. The defendants’ counsel contended that proof of such demand was a necessary prerequisite to the maintenance of the action. Upon this point I ruled, that such a demand was alleged in the writ, and not denied in the answer, and that therefore it need not be proved by the plaintiffs.

“ The plaintiffs offered evidence tending to prove that Fuller made with the defendants a written contract to furnish them with iron pipe for the Salem Gas Light Company, whose works they had agreed to construct, and to take his pay therefor in stock of that company at par; that the plaintiffs had contracted to sell and did sell to Fuller a quantity of iron for \$7000, agreeing to take payment therefor in stock of said company at par; that while the negotiations between the plaintiffs and Fuller were going on, George Odiorne, (who acted as broker for the plaintiffs, but did not disclose his agency to the defendants,) went to one of the defendants, and obtained a parol promise by the defendants to accept an order to be drawn by Fuller on them — the person in whose favor the order was to be drawn, and the time when the stock was to be delivered, not being mentioned — for \$7000, payable in the stock of the Salem Gas Light Company at par; that afterwards the bargain between the plaintiffs and Fuller was completed, the iron sold, and a bill of sale thereof given, and said order on the defendants taken in payment therefor.

“ The defendants’ counsel contended that such a promise as above mentioned, if proved, was insufficient to maintain the action, because the promise was not in writing, and was without consideration, and because neither the payee of the order, nor the time when the order was to be payable, was mentioned

or included in the promise; and that this evidence should not be received.

"The plaintiffs also offered evidence tending to prove a parol promise by the defendants to the plaintiffs to accept the order now in suit after the same was drawn. The defendants' counsel objected to this evidence, because the promise was not in writing, and was without consideration.

"Thereupon I submitted to the jury the following questions, and ruled, for the purposes of the trial, that if the jury found in the affirmative upon either of them, it would be sufficient to enable the plaintiff to maintain the action:

"1st. Did the defendants, before the order of Fuller now in suit was drawn, verbally agree to accept an order to be drawn by him — the person in whose favor it was to be drawn not being mentioned, nor the time when the stock was to be delivered — for seven thousand dollars, payable in the Salem Gas Light Company's stock at par?

"2d. Did the defendants, after the order now in suit was drawn, verbally promise and agree with the plaintiffs to accept it?

"The jury found in the affirmative upon both questions; whereupon I directed a general verdict to be taken for the plaintiffs.

"Upon the subject of damages, the defendants' counsel contended that the measure of damages should be the value of the stock at the time when the breach of the defendants' promise was made, or at the date of the writ. I ruled that the measure of damages should be the value of the stock at the time of the trial, and the damages were assessed by the jury accordingly."

J. P. Healy, for the defendants, upon the measure of damages, cited *Quarles v. George*, 23 Pick. 400; *Shaw v. Nudd*, 8 Pick. 9; *Parks v. Boston*, 15 Pick. 206; *Stone v. Codman*, 15 Pick. 297; *Weld v. Oliver*, 21 Pick. 559.

G. M. Browne, for the plaintiffs, upon the same question, cited *Shepherd v. Johnson*, 2 East, 211; *M^r Arthur v. Seaforth*, 2 Taunt. 257; *Harrison v. Harrison*, 1 Car. & P. 412; *Downes v. Back*, 1 Stark. R. 318; *Clark v. Pinney*, 7 Cow. 681.

Welch, Administrator, v. McClintock.

THOMAS, J. 1. The ruling of the presiding judge, as to the effect of the allegation of a demand in the declaration, not denied in the answer, was in strict conformity to the *St.* of 1852, c. 312, § 26. Alleged with substantial precision and certainty, and not denied in clear and precise terms, it must be deemed to be admitted.

2. If the iron had been delivered under the contract to the defendants by Fuller, such delivery of the iron would be payment for the stock. If so, the agreement to accept the order to transfer to the plaintiffs would not be within the statute of frauds. It would not be an agreement to sell and transfer stock. The stock would have been already purchased and the consideration paid. It would be but an agreement to transfer the stock to which Fuller was entitled to the plaintiffs.

But if, on the other hand, the iron had not been delivered, it would be an agreement for the sale and delivery of so much stock, the evidence of which should, under the fourth section of the statute of frauds, have been in writing. *Rev. Sts. c. 74, § 4.*

3. The true measure of damages was the value of the stock at the time when, under the contract, it should have been delivered. No time being specified in the order for the delivery, the time when the demand was made must be the point at which the value is to be fixed. *New trial ordered.*

CHARLES A. WELCH, Administrator, *vs.* JOHN MCCLINTOCK.

By a charter party of a vessel for a voyage from New York to Charleston, and thence to Liverpool, the master and partowner agreed to victual and man the vessel and keep her in good condition, and the charterer agreed to furnish her with a full cargo of cotton at Charleston and to pay a certain freight on delivery of the cotton in Liverpool; the vessel was to be consigned to the charterer's friends in Charleston, and to their agents in Liverpool; and what money the master might require for the ship's disbursements in Charleston was to be advanced to him, and paid by his bill of exchange on the freight. The vessel was laden at Charleston, and the master drew a bill accordingly on the said agents at Liverpool, and by letter requested them to accept the same and to insure the amount on account of the owners of the vessel. The vessel on her arrival at Liver-

Welch, Administrator, v. McClintock.

pool was committed to said agents, and they paid the disbursements, delivered a portion of the cargo and collected part of the freight, and then became bankrupt. The master collected the rest of the freight himself, and paid the bill of exchange which he had drawn on them. *Held*, that drawing the bill on the consignees at Liverpool did not make them the master's agents to collect freight; that he had a lien on the freight for the charter money, and was entitled to retain from the amount collected by him the whole of the charter money, after deducting the ship's disbursements at Liverpool.

ACTION OF CONTRACT by the administrator of Claudius Dord against the master and partowner of the Ship *Medallion*, for money had and received to the plaintiff's use, under a charter party executed on the 26th of October 1852, whereby the defendant lets the *Medallion* to Dord for a voyage from New York to Charleston, S. C., and thence to Liverpool, and "doth engage that the vessel in and during the said voyage shall be kept tight, staunch, well fitted, tackled and provided with every requisite, and with men and provisions necessary for such a voyage;" and Dord "doth engage to provide and furnish the said vessel with a full cargo of lawful merchandise (or sufficient for ballast) during the voyage aforesaid, with a full and complete cargo of cotton;" and to pay to the defendant or his agent, "for the charter or freight of said vessel during the voyage aforesaid, three eighths of one penny sterling per pound for cotton bales, with five per cent. primage, payable on delivery of the cargo in Liverpool;" and it is agreed "that what money the master may require for ship's disbursements in Charleston will be advanced, taking his bill on the freight, subject to the usual charges on the same;" "that this charter shall commence when the vessel is ready to receive cargo at her place of loading, and notice thereof is given to said Dord or his agent"; and "that the ship will go consigned to charterer's friends, Messrs. Stewart, Harper & Co. of Charleston, and to their agents at Liverpool, free of commissions and brokerage on freight at Charleston; also to be free of wharfage and dock dues." Trial before *Bigelow, J.*, who made the following report thereof:

"It appeared that the defendant proceeded with the ship to Charleston, where Stewart, Harper & Co. caused her to be laden with a full cargo of cotton, for which the defendant signed bills of lading at four eighths of a penny per pound; that the plain-

Welch, Administrator, v. McClintock.

tiff's friends, Stewart, Harper & Co., at Charleston, agreeably to the charter party, designated Collman & Stolterfoht, of Liverpool, as the persons to whom the ship should be consigned; and wrote and forwarded to them a letter, (a copy of which is in the margin,*) and wrote another letter (also copied in the margin †) to Hopley & Co. of Charleston, (who were shippers of a large part of the cargo, and correspondents of Collman & Stolterfoht,) which was transmitted to Collman & Stolterfoht by Hopley & Co., with a request that they would conform to it and advise them of the settlement.

"The defendant introduced the deposition of Heman Stolterfoht, of the firm of Collman & Stolterfoht, who testified that the instructions which said firm received as to the disposition of the freight of the Medallion were contained in said letters, and

* Charleston, 1st December 1852.

Messrs Collmann & Stolterfoht, Liverpool.

Gentlemen, We chartered the Ship Medallion to sail from this port to Liverpool with a cargo of cotton, at three eighths of one penny per lb., and five per cent. primage on said rate, payable on delivery of said cargo in good order at the port of Liverpool.

The ship is not to be bound for more, for collecting said freight, according to our understanding, than if the captain had signed bills lading for only the rate mentioned in the charter party.

Yours truly,

Stewart, Harper & Co.

P. S. There are thirty one bales in the cabin and sails-room, on which the captain is to receive full freights, say one half penny per lb.

† Charleston, 3d December 1852.

Messrs. G. A. Hopley & Co., Charleston.

Gentlemen, We herewith enclose charter party of the Ship Medallion, which please forward to the consignees in Liverpool, Messrs Collmann & Stolterfoht, with instructions to pay the amount of freight, as per charter party, to whoever may be legally authorized to receive the same on the part of the owners of said ship, and to reserve whatever amount over and above this sum, which is due by bills lading of her present cargo, and subject to your orders.

Capt. McClintock has this day valued on Messrs. Collmann & Stolterfoht in our favor, for £364 8s. 1d. against freight earned by the ship under the charter party; which please advise them to honor.

Yours truly,

Stewart, Harper & Co.

Welch, Administrator, v. McClintock.

that they had no other instructions whatever; and the defendant drew a bill on them for £364 8s. 1d., directed to be charged 'to account of freight of ship Medallion,' which he requested them by letter to honor and to insure the amount for account of the owners, and which was accepted by them, but never paid, and was afterwards taken up by the defendant.

"The defendant introduced evidence tending to prove that by the custom of Liverpool the consignees of a ship are to collect the freight. The witness who so testified, in answer to a question by the plaintiff, said he did not mean to say that there is a custom to prevent a master from collecting his freight from the consignee of the cargo before he delivers his cargo, or as it passes over his vessel's side, even if he is consigned to a mercantile house there, if bills of lading have been signed as referred to.

"On the ship's arriving at Liverpool, she was placed in the hands of Collman & Stolterfoht, who paid the disbursements of the ship, and delivered her cargo, except nine hundred and ninety four bales, which were not claimed by the consignees thereof; and received a portion of the freight therefor, at the rate mentioned in the bill of lading, and then became bankrupt. The defendant thereupon interfered to prevent the uncollected portion of the freight from going into their hands, and collected it himself, including the freight on the nine hundred and ninety four bales; and this action was brought to recover from him one quarter of what he so received, as belonging to the plaintiff.

"The defendant drew up an account, wherein he charged the plaintiff with full freight as per charter party, three eighths of a penny per pound on the whole cargo, viz: that delivered by Collman & Stolterfoht and by himself, deducting the disbursements paid by Collman & Stolterfoht; and claimed to retain out of the money received by him as aforesaid enough to make up his entire freight by charter party.

"It was in contest between the parties whether Collman & Stolterfoht had been constituted agents both of the owners and of the charterers to receive the whole freight of the cargo, as per bills of lading, and to hold three quarters thereof to the credit

Welch, Administrator, v. McClintock.

of the said owners, and one quarter thereof to the credit of the charterers; the plaintiff contending that they were agents of both; and the defendant contending that they were not his agents to collect his freight as per charter party. The case was submitted to a jury on this question, who found for the defendant.

“ The plaintiff further contended that, at all events, the defendant, by drawing the said bill of exchange on Coleman & Stolterfoht, which they accepted, and sending the letter annexed, had given to them the right to collect freight as his agents to that amount, and therefore that he was entitled to recover of the defendant a larger amount than the sum for which the defendant offered to be defaulted. But the judge reserved this question for the consideration of the whole court. If the whole court should be of opinion that the ground contended for by the plaintiff should be sustained, then judgment would be rendered for such sum in addition to the verdict as the court should direct, with costs for the plaintiff; and otherwise, judgment on the verdict for the amount only for which the defendant had offered to be defaulted, without costs, and costs for the defendant after the offer to be defaulted.”

C. A. Welch, pro se.

J. C. Dodge, for the defendant.

SHAW, C. J. The defendant, as master, had the right by the general maritime law to receive the whole of the freight at Liverpool, as by the bills of lading which he had signed. But for the money which he would thus have received he would be accountable to the charterers; he was their agent to sign bills of lading and receive freight on delivery. Collman & Stolterfoht were the agents of the charterers at Liverpool, to receive all money collected for them by the master. Had he collected the whole of the money, he would have been accountable to those agents for the charter money, that is to say, by himself holding for the owners of the ship three fourths of the amounts received under the bills of lading, and paying over the balance to the said agents of the charterers. The master would, in his capacity of partowner and agent of the other owners, have had

Welch, Administrator, v. McClintock.

a lien on this freight money for his charter money. Thus the whole account would have been settled.

But the master would have had a lien only, which he would not be bound as agent of the charterers to enforce, for in effect it would have been enforcing it against themselves. If they had chosen to permit their agents Collman & Stolterfoht at Liverpool to collect the whole freight of the shippers, and the master had consented to it, the charterers would still have been liable on their express contract for the charter money, whether Collman & Stolterfoht paid it over to their principals, the charterers, or not. Had there been no bankruptcy till the freight was all collected, this might have been the result.

The money due from the shippers, being the money of the charterers and being collected by their agents, whether those agents paid it to them or not, the charterers are liable to the shipowners for the charter money. If the agents failed with the charterers' money in hand, it must be the loss of their principal. All which did receive, they received in that capacity. But they could only receive by permission of Captain McClintock; and when they became bankrupt, it was for the benefit of all concerned that they should receive no more; and therefore Captain McClintock rightfully interfered, according to his right and power as master, for the benefit of all concerned.

Had he received the whole of the freight due from the shippers, he would have had a lien on the whole for the charter money due the owners. The whole being subject to such lien, every part was so. If, after he withdrew the authority, he received freight of shippers, his lien for the whole of the charter money attached to the portion of the freight received; and if it was sufficient to pay the charter money, he had a right so to appropriate it.

Does the drawing of the bill in Charleston make any difference? By the charter party, the owners were to victual, man and navigate the ship at their own expense. They must therefore pay all disbursements at Charleston. But there was a stipulation in the charter party, that the charterers or their agents should advance all the necessary disbursements at Charleston,

taking a bill payable from the freight (charter money) at Liverpool. But the charter money would be paid on account of the ship; and if the ship should not arrive at all, then it would not be due at all, and then the advance must be repaid.

The disbursements were made by Stewart, Harper & Co., the charterers' agents at Charleston, and according to agreement they took Captain McClintock's bill on their own agents for their reimbursement, payable in Liverpool out of the charter money, which would be due him on arrival of the vessel and delivery of the goods. Had the vessel never arrived, Captain McClintock would have been obliged to pay the bill, being the amount of the disbursements, and therefore that amount was at the risk of the owners, was insured for their benefit, and they paid the premium. But if the ship should arrive and deliver the cargo, the charter money would be due to the charterers; and whether the freight due from shippers was received by the agents or by the master, this would be a fund out of which the bill would be paid. If the master received it, he must pay the bill, and it is said that he did.

Stewart, Harper & Co. had their remedy as holders of the bill accepted, either by proving it against Collman & Stolterfoht or, as they did, claiming it of the drawer; and then their remedy for their part of the freight received by Collman & Stolterfoht would be by charging it as money had and received in account, and proving it against their estate if the balance was in favor of Stewart, Harper & Co.

This result is not varied in our opinion by the stipulation in the charter party, that the vessel is to go consigned to the charterers' friends Stewart Harper & Co. in Charleston and to their agents in Liverpool. This does not in any manner make Collman & Stolterfoht agents of the owners, for all purposes or for the purpose of collecting shippers' freight. The effect would be that, as such consignees, whatever sums they disbursed for the owners, the owners would be liable to them for. But it did not alter the relation of the master to the charterers, by which he was authorized to collect all the freight of the shippers, being accountable to the charterers' agents for it, first deducting his charter.

 Albee v. Wyman.

As to the custom in Liverpool, we do not understand that it goes further than this: that when the consignees of the vessel are persons in good credit, the freight bills are placed in their hands for collection by the master; but we do not understand that any custom prevails there contrary to the common rule of maritime law, that when the money is due on bills of lading, whoever is owner, either absolutely or for the particular voyage, it is the right of the master in the first instance to collect them, and optional with him whether or not to authorize the person to whom the vessel is consigned to collect them.

The court are therefore of opinion that the plaintiff has no right to recover, beyond the amount for which the defendants offered to be defaulted, and that judgment be entered on the verdict, with costs for the plaintiff to the time of such offer, and for the defendant since.

HENRY N. ALBEE vs. JAMES WYMAN.

Whether articles of separation, between husband and wife actually living apart, in which the husband covenants with a trustee to provide for the future separate maintenance of the wife, are valid in this commonwealth, *quære*.

Whether a covenant, in articles of separation, that the husband will pay an annuity to the wife during her life, is discharged by her obtaining a divorce and marrying another man, *quære*.

By articles of separation a husband covenanted, in consideration of his wife's withdrawing a libel for divorce, to pay her a sum yearly during her life. The wife afterwards, by another similar libel, obtained a decree for divorce from the bond of matrimony, and for alimony, which by agreement was fixed at the sum payable under the articles; and the wife, after receiving two instalments of such alimony, married another man, whereupon the alimony was reduced by the court to a nominal sum. *Held*, that the covenant, if ever valid, was discharged.

ACTION OF CONTRACT on an indenture, dated November 1st 1843, between the defendant, his wife Margaret Wyman, and the plaintiff, which recited that the defendant and his wife had for some time lived apart, and had mutually agreed to do so for the rest of their lives, and that the wife had agreed to with

draw a libel for divorce pending in this court, and in consideration thereof the defendant had agreed to allow her \$300 annually during her life for her maintenance and support; contained covenants by the defendant to suffer his wife to live apart and without molestation during their joint lives, and to pay to her, or to the plaintiff for her use, \$300 annually, in at least semiannual payments, during her natural life; set forth certain conveyances from the defendant to the plaintiff for securing that annuity; and by which the plaintiff covenanted to appropriate the proceeds of such securities to the payment of the annuity, and after the death of the wife to reconvey the same to the defendant, and also agreed in behalf of the wife that she accepted this provision made for her support, and that the defendant might in like manner live apart from her.

At the trial in this court it appeared that in 1851 the defendant's wife filed a libel for divorce on the ground of adultery, in the same words as the libel mentioned in the indenture, but covering the subsequent time, and in January 1852 obtained thereon a decree for divorce and alimony, and within a month afterwards married another man; that the securities mentioned in the indenture had been reconveyed by the plaintiff to the defendant; and that since the wife's second marriage, her alimony under the decree of divorce had been reduced by the court, on petition of the defendant, to a nominal sum.

The counsel for the wife in both libels, and who was admitted to have been authorized to act for her in the matter, testified that while the second libel was pending he had negotiations with the defendant's counsel as to the amount of alimony, which was finally arranged at \$300 annually, payable in quarterly instalments, and secured to his satisfaction; that notes for the first two instalments were given and afterwards paid by the defendant; that no steps were taken to recover the sum stipulated in the indenture until after the reduction of the alimony as aforesaid; and that he understood that after the decree for alimony she was to have \$300, not \$600, and that he was to give up the indenture when security was given for the alimony.

Upon this evidence, *Metcalf*, J. was of opinion that the action

could not be maintained, but reported the case for the decision of the full court.

G. F. Homer, for the plaintiff. 1. It is the settled law of England, that courts of law and equity will sustain the covenants of a husband with a trustee for his wife's support, in articles of separation, where the separation exists already or is to be immediate. *Rodney v. Chambers*, 2 East, 283. *Bateman v. Ross*, 1 Dow, 235. *Westmeath v. Westmeath*, Jac. 136. *Clough v. Lambert*, 10 Sim. 174. *Worrall v. Jacob*, 3 Meriv. 268. *Scholey v. Goodman*, 1 Bing. 349. *Wilson v. Mushett*, 3 B. & Ad. 743. *Jee v. Thurlow*, 2 B. & C. 547. *Wilson v. Wilson*, 14 Sim. 416. *Ker v. Ruxton*, 11 Eng. Law & Eq. 220. *Sanders v. Rodway*, 16 Beav. 207. *Webster v. Webster*, 1 Sm. & Gif. 489. Clancy on Husb. & Wife, (1st Amer. ed.) 397, 399. 2 Bright on Husb. & Wife, 305.

The English doctrine has been affirmed in the following American cases: *Page v. Trufant*, 2 Mass. 159. *Hollenbeck v. Pixley*, 3 Gray, 521. *Baker v. Barney*, 8 Johns. 72. *Anderson v. Anderson*, 1 Edw. Ch. 380. *Champlin v. Champlin*, Hoffm. Ch. 55. *Beach v. Beach*, 2 Hill (N. Y.) 260. *Carson v. Murray*, 3 Paige, 483. *Rogers v. Rogers*, 4 Paige, 516. *Shelthar v. Gregory*, 2 Wend. 422. *Calkins v. Long*, 22 Barb. 97. *Nichols v. Palmer*, 5 Day, 47. *Hutton v. Hutton*, 3 Barr, 100. *Blaker v. Cooper*, 7 S. & R. 500. *Reed v. Beazley*, 1 Blackf. 97. *Carter v. Carter*, 14 Sm. & Marsh, 59. *Brown v. Brown*, 2 Maryland Ch. 316. *Chapman v. Gray*, 8 Georgia, 341. *Bettle v. Wilson*, 14 Ohio, 257.

The compromise of a suit by the wife has been held a good consideration for such covenants, even against creditors. *Wilson v. Wilson*, 14 Sim. 405. *Jodrell v. Jodrell*, 9 Beav. 45. *Page v. Trufant*, 2 Mass. 159. See also 2 Bright on Husb. & Wife, 333-335; Bell on Husb. & Wife, 531-535; *Frampton v. Frampton*, 4 Beav. 287.

The objections against the policy of articles of separation have been fortified, if not caused, by difficulties arising from the province of the ecclesiastical courts; by special provisions as to future separation; and by the doctrine that after the execution

of a deed of separation the wife was to all intents a *feme sole*. And such objections are uniformly accompanied by a declaration that the validity of proper articles of separation is too clearly established to be questioned. *St. John v. St. John*, 11 Ves. 526. 2 Bright on Husband & Wife, 523

2. The wife's divorce and second marriage are no bar to that action on the unqualified covenant of the husband to pay her an annuity during her life. *Jee v. Thurlow*, 2 B. & C. 547. *Wilson v. Mushett*, 3 B. & Ad. 743. *Blaker v. Cooper*, 7 S. & R. 500. *Babcock v. Smith*, 22 Pick. 61. Bishop on Mar. & Div. § 670.

3. No agreement to substitute the decree of alimony for the covenant in the articles is shown; and if it was, it would be ineffectual without the wife's consent. *Seagrave v. Seagrave*, 13 Ves. 439. *Calkins v. Long*, 22 Barb. 109. *Eastman v. Wright*, 6 Pick. 322. *Grover v. Grover*, 24 Pick. 266.

H. C. Hutchins, for the defendant. 1. Articles of separation have never been recognized in this commonwealth, and the court will not adopt a policy which has always been regretted even where it has been most fully established. *Evans v. Evans*, 1 Hagg. Consist. 35. *Jee v. Thurlow*, 2 B. & C. 547. *Durant v. Titley*, 7 Price, 577. *St. John v. St. John*, 11 Ves. 526. *Westmeath v. Westmeath*, 1 Dow & Clark, 519. *Rodney v. Chambers*, 2 East, 283. *Worrall v. Jacob*, 3 Meriv. 268. *Jones v. Wait*, 7 Scott, 317. *Rogers v. Rogers*, 4 Paige, 516. *Champlin v. Champlin*, Hoffm. Ch. 55. *Heyer v. Burger*, Hoffm. Ch. 1. *Miller v. Miller*, Saxton, 386. *Hope v. Hope*, 22 Beav. 351. 2 Story on Eq. §§ 1427, 1428. Articles of separation have been upheld in England on account of the difficulty and expense of procuring divorces, reasons which do not exist here. *Ames v. Chew*, 5 Met. 320. To uphold them would allow man and wife to separate for any cause, and encourage and confirm the separation by a fund set apart for the purpose.

Articles in contemplation of future separation have always been held void. *Florentine v. Wilson*, Hill & Denio, 303. *Westmeath v. Salisbury*, 5 Bligh N. R. 339. And what is the difference in policy between a past and a future separation? *Jones v. Wait*, 7 Scott, 317.

These articles are void because they do not show a sufficient cause for the separation. *Jones v. Wait*, 7 Scott, 317.

2. The agreement of the defendant to pay the annuity is based on the relation of husband and wife in a state of separation, and his duty to support her. But that *status* has been entirely changed by the divorce and second marriage, which have annulled the articles and discharged the defendant from his liability. *Charruaud v. Charruaud*, 1 N. Y. Leg. Obs. 134. *Hastings v. Orde*, 11 Sim. 205.

Reconciliation, without any act of cancellation, annuls articles of separation and rights growing out of them, even though the articles be so expressed as to provide for the wife during her life; because such articles are based on separation, and by reconciliation new obligations arise, inconsistent with separation; *a fortiori* new obligations by divorce and second marriage. *St. John v. St. John*, 11 Ves. 521. *Westmeath v. Salisbury*, 5 Bligh N. R. 339. Shelford on Mar. & Div. 629. Clancy on Husb. & Wife, 414. *Fletcher v. Fletcher*, 2 Cox Ch. 99. *Baleman v. Ross*, 1 Dow, 235.

3. It appears from the testimony of the plaintiff's counsel that the indenture was retained only as security for the payment of the alimony; and that being diminished to a nominal sum, no action can be maintained on the indenture to recover the annuity.

DEWEY, J. The contract sought to be enforced is one for the separate maintenance of the wife, made between husband and wife through the intervention of a trustee, in whose name this action is brought. It was an agreement for their living apart during their joint lives, and contained a covenant on the part of the husband that he would suffer this without any molestation of the wife on his part, and would pay to the plaintiff for her use \$300 per annum during her life, for her maintenance and support; the wife also on her part covenanting, through the plaintiff, that she would allow the husband to live separate without molestation from her, and accepting the provision thus made for her support. It further appeared that the parties had, for some time previous to the execution of this agreement, actually lived separate and apart.

It must be assumed that such a contract would, by the well settled law of England, be held valid, although obnoxious certainly to very grave objections, arising from the relations of the respective parties and the impolicy of furnishing facilities for a continued separation of those whose solemn obligations and duties have united them as members of one family. Numerous decisions are found in different states of the Union in accordance with the English doctrine. But in the view we have taken of the merits of the case upon other points, it has become unnecessary to consider at large the question of the validity of such contracts in Massachusetts.

Assuming this contract to have been valid in its inception, the question arises whether the subsequent acts of the parties thereto have not discharged the defendant from any further liability upon this contract to make the annual payment therein stipulated.

The principal grounds of defence relied upon by the defendant are: 1st. The renewal on the part of Mrs. Wyman of her application for a divorce from the bonds of matrimony upon the alleged ground of adultery on his part, and her obtaining such decree of divorce; 2d. The subsequent marriage of Mrs. Wyman to another person, with whom she now cohabits, and who is bound to support her; 3d. The agreement and understanding of both parties that upon the obtaining of such divorce, and a decree for alimony to be paid her, such decree for alimony was in lieu of the provision for her maintenance that was contained in the articles of separation.

As to the first and second of these grounds, no controversy exists on the facts; but the question is of the legal operation of those facts. The plaintiff insists that, as matter of law, these facts do not affect the liability of the defendant to pay to his late wife the annual sum stipulated to be paid to her for her support and maintenance.

We are referred to the case of *Jee v. Thurlow*, 2 B. & C. 547, as sustaining the view that such subsequent divorce and marriage afterwards by the wife to another person do not discharge the former husband from a continued liability on

Albee v. Wyman.

promise like the present. That case differs from the present in that the subsequent divorce was obtained by the husband on his application. It might properly be held that the husband could not thus defeat his own covenant to pay his wife an annual sum during her life. Again, it is to be remarked that the divorce there obtained was only a divorce *a mensa et thoro*. The relation of husband and wife still existed, though in a modified form, and the effect of the divorce was not such as to authorize the wife to marry again, and it left her equally dependent upon her husband for support as before.

The case of *Blaker v. Cooper*, 7 S. & R. 500, is more relied upon, and is more in point. In that case an action was sustained upon such a bond and articles of separation, in which the husband covenanted to pay a certain sum annually for the use of the wife, "during the term of her natural life," notwithstanding a subsequent divorce between the parties and her subsequent marriage to another person, the court holding that those facts did not discharge the liability of her first husband upon his bond. It does not appear from the case as reported which party applied for and obtained the divorce. Another fact however does appear, which may be thought of some importance, that, as a consideration for the agreement on the part of the husband to pay her a certain annual sum during her life, she released her right of dower in his real estate.

On the other side, the argument is pressed upon us that this agreement on the part of the husband was based upon the existing relations between the parties as husband and wife, and his duty, as long as that relation existed, to support the wife; that the divorce of the parties from the bond of matrimony changed that relation; and that upon such decree of divorce she would be entitled to her support and maintenance in another form, by an allowance of alimony, an allowance which might exceed in amount the sum agreed to be paid under the articles of separation, and be paid at more frequent intervals. These facts, in connection with the further fact that immediately after obtaining such divorce she had married another person, it is contended should *per se* discharge the further liability of her first husband

Albee v. Wyman.

to pay her the annual allowance originally stipulated to be paid.

Whether these facts standing alone — that is, a mere divorce and subsequent marriage — would be held to discharge the defendant from liability in the present action, is certainly questionable. Although there are many reasons that might be urged to support that position, yet it may be that the bond is too absolute in its terms to be thus limited to the period of the continuance between the parties of the relation of husband and wife. The weight of authority, so far as presented in the argument of the case, would seem to that effect.

This has led us to consider the other portions of the defence, and those which are peculiar to the present case. The facts already alluded to are to be taken in connection with those which we are about to state. The fact, recited in this indenture as the consideration of the agreement to pay Mrs. Wyman \$300 annually during her life, that the wife had agreed to withdraw a libel for divorce then pending in this court, is to be considered in deciding the question of the defendant's liability. The libel was for the time withdrawn, but the same libel, that is, a libel *in totidem verbis*, was subsequently filed anew, embracing all the allegations in the former libel, and only varied in its effect by the date, which could extend the charges to a later period of time, but included all that were set forth in the first libel. Upon obtaining a decree for divorce upon this second application, she claimed an allowance for alimony. Such alimony was allowed, and ordered to be paid her quarterly by the defendant. It is shown that the sum fixed to be the amount of the alimony was finally a matter of arrangement between the parties; that it was to be the same sum as was to be paid under the articles of separation, the sum of \$300 annually. It is admitted that it was not an additional allowance of \$300, and that it was not the expectation or understanding of the parties that Mrs. Wyman should have \$300 as alimony, payable quarterly under this decree, and also the further sum of \$300 annually under the stipulations of the articles of separation. It is conceded that only one sum of

\$300 is properly demandable of the defendant; but it is said that the defendant failed to give security for the future payment of the alimony, although he did so as to the first two payments, which were actually received by Mrs. Wyman, and embraced more than the period before her second marriage.

As it seems to us, the wife did accept this decree for alimony in lieu of the provision for her support and maintenance in the articles of separation. She acted upon the understanding that such was to be the effect of the divorce and decree for alimony. She received the first two quarters' allowance under that decree. As it is conceded they were not both to exist as liabilities of the husband; by accepting the latter and enjoying its benefits, she discharged the former. Subsequently to the marriage of Mrs. Wyman to another husband, this court has thought proper to reduce the amount of alimony to a nominal sum, and for the reason that it was not necessary or proper to charge her former husband for her future support.

Under these circumstances, Mrs. Wyman seeks again to revive the old obligation for her maintenance, found in the articles of separation. This, we think, she cannot do. The application for a divorce and alimony was her own affair, a voluntary act of hers, instituted for her benefit. So long as she remained unmarried, no ground existed for lessening the amount of such alimony, while, of course, it was open to her application for increase for good cause. By her act of subsequent marriage, she secured herself other resources for her support, and thus voluntarily furnished the ground for the reduction of the alimony.

Upon the whole case, as disclosed by the evidence and the conceded facts, the court are of opinion that the plaintiff is not entitled to recover in this action.

Judgment for the defendant.

JAMES O'CONNOR vs. CALVIN VARNEY.

A judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such nonperformance.

ACTION OF CONTRACT to recover damages for Varney's failure to build certain additions to a house according to the terms of a written contract between the parties. Answer, a judgment recovered by O'Connor in an action brought by Varney against him on that contract to recover the price therein agreed to be paid for the work, in defence of which O'Connor relied on the same nonperformance by Varney, and in which an auditor to whom the case was referred, and upon whose report that judgment was rendered, found that Varney was not entitled to recover under the agreement, by reason of the work having been so imperfectly done that it would require a greater sum than the amount sued for to make it correspond with the contract.

At the trial of this action *Bigelow, J.*, upon the inspection of the auditor's report and the record in the former action, ruled that that judgment was a bar, and ordered a verdict for the defendant, which was returned, and the plaintiff alleged exceptions.

C. G. Thomas, for the plaintiff.

J. W. Hubbard, for the defendant.

SHAW, C. J. The presiding judge rightly ruled that the former judgment was a bar to this action. A party against whom an action is brought on a contract has two modes of defending himself. He may allege specific breaches of the contract declared upon, and rely on them in defence. But if he intends to claim, by way of damages for nonperformance of the contract, more than the amount for which he is sued, he must not rely on the contract in defence, but must bring a cross action, and apply to the court to have the cases continued so that the executions may be set off. He cannot use the same defence, first as a shield, and then as a sword. *Bennett v. Smith*, 4 Gray, 50. *Sargent v. Fitzpatrick*, 4 Gray, 511. *Sawyer v. Woodbury* 7 Gray, 499. *Exceptions overruled.*

Merchants' Bank of Newburyport v. Stevenson & others.

**PRESIDENT, DIRECTORS AND COMPANY OF THE MERCHANTS' BANK
OF NEWBURYPORT vs. JOSHUA T. STEVENSON & others.**

It seems, that the payment of dividends and preferred debts in insolvency out of the estate of a manufacturing corporation does not diminish the liability of its directors under the Rev. Sts. c. 38, § 25, for the excess of its debts over its capital stock.

The liability of directors of a manufacturing corporation under the Rev. Sts. c. 38, §§ 25, 29, 31, for the excess of its debts over its capital stock, must be enforced by bill in equity, and not by action at law, if the debts for which the directors are so liable amount to more than such excess.

ACTION OF TORT upon the Rev. Sts. c. 38, § 29, against the directors of a manufacturing corporation. Writ dated January 15th 1856.

The declaration set forth the making by the Glendon Rolling Mill, on different days between September 15th and November 15th 1852, of four promissory notes to the plaintiffs, and the liability of that corporation to them at the time of the making of each note; the amounts of the capital stock actually paid in, and of the debts of the corporation; that such debts exceeded the amount of such capital stock; and "that the defendants, at the time said note was made, were officers of said corporation, to wit, the directors thereof, whereby and by force of the statute in such case made and provided the defendants became liable to pay to the plaintiffs the amount of said note and interest thereon, and an action has accrued to the plaintiffs to have and demand the same of the defendants."

The defendants severally demurred to the declaration, and assigned the following causes of demurrer:

1st. That it did not appear that at the time when this action was brought the debts owed by the corporation did exceed the amount of its capital stock actually paid in, or, if such excess had at any previous time existed, that the whole debt of the corporation had not then been reduced to the amount of its said capital stock.

2d. That it appeared that at the times of contracting the several debts of the corporation, mentioned in the declaration,

Merchants' Bank of Newburyport v. Stevenson & others.

there were other creditors of the corporation, having claims similar to the plaintiffs, who were not made parties to this suit.

3d. That such creditors were entitled to claim of the defendant and the other directors of the corporation, a proportional payment of their respective demands, on account of the said alleged excess; and that their rights and the plaintiffs', and the liabilities, if any, of the defendant and the other directors of the corporation to them, could not be determined at law, but only by bill in equity.

The case was submitted to the decision of the court upon the declaration and the demurrers, and the following facts, which it was agreed, for the purposes of this hearing, should be considered as if alleged in the declaration and admitted by the demurrers :

Said manufacturing corporation was chartered in March 1847 with a capital of \$500,000, all but \$200 of which was actually paid in; went into operation and continued in business until the 16th of December 1854, when it stopped payment; and two days afterwards went into insolvency, and had assignees duly appointed under *St.* 1851, c. 327. At the times of the making of the four notes declared on, and of the commencement of the proceedings in insolvency, the debts of the corporation exceeded, in different amounts, such capital stock. Before this action was commenced, the whole amount of the debts of the corporation had been reduced by the payment of preferred debts and of dividends to less than the amount of such capital stock.

B. R. Curtis & F. C. Loring, for the defendants.

C. B. Goodrich, for the plaintiffs. 1. Whenever an excess of indebtedment beyond the capital stock of a manufacturing corporation shall exist, "the directors, under whose administration it shall happen, shall be jointly and severally liable to the extent of such excess, for all the debts of the company then existing, and for all that shall be contracted, so long as they shall respectively continue in office, and until the debt shall be reduced to the said amount of the capital stock." *Rev. Sts. c. 38, § 25. St. 1829, c. 53, § 8. Milldam Foundry v. Hovey*, 21 Pick. 454.

The liability of the directors from an excess of indebtment attaches at the time when the debt is contracted, and not at the commencement of an action for its recovery. The plaintiffs aver the existence of an excess of indebtment at the time their debt was contracted; a subsequent reduction does not discharge the liability, but only protects the officers from debts subsequently incurred within that limit. Rev. Sts. c. 38, §§ 16, 19, 20, 22. The reduction must be by the act, and out of the private funds, of the directors; not by payments made by an assignee in insolvency of the corporation. *Stedman v. Eveleth*, 6 Met. 120. *Curtis v. Harlow*, 12 Met. 5.

2. Any creditor, whose debt has been contracted while the excess of indebtment continued, may have an action at law against the directors under whose administration the excess was created. The words of the statute upon this point are explicit. "When any of the officers of any manufacturing corporation shall be liable, by the provisions of this chapter, to pay the debts of such company, or any part thereof, any person to whom they are so liable may have an action on the case against any one or more of the said officers;" Rev. Sts. c. 38, § 29; or "may, instead of the proceedings mentioned in" §§ 29 & 30, "have his remedy against the said officers or stockholders by a bill in equity." § 31. The same election of remedies was given by St. 1829, c. 53, § 11.

The cases of *Harris v. First Parish in Dorchester*, 23 Pick. 112, and *Crease v. Babcock*, 10 Met. 531, arose under the Rev. Sts. c. 36, §§ 30, 31, which merely declared a liability, without specifying the remedy. This is more like a claim against the directors of a bank under c. 36, § 11, which expressly authorizes a creditor to pursue his remedy by action, or by bill in equity, at his election.

It does not appear that any other creditors who may have claims against the defendants will ever assert their rights. If they should, the defendants, whenever they shall have paid to the extent of their liability, may plead such payment in answer, and in discharge of any additional liability. Even if equity might have been resorted to, yet the plaintiffs have a right,

under the statute, to proceed at law, until restrained by other creditors asking the assistance of the court, or by the defendants bringing their suit against all the creditors in like condition with the plaintiffs, with an offer to pay if liable; in either of which events the plaintiffs would be entitled, by reason of their diligence in asserting their legal rights, to priority of payment, or, at least, to their costs.

SHAW, C. J. The reduction of the debts within the capital stock by dividends and payments by the assignees was not such a reduction, within the meaning of the statute, as to exempt the defendants from liability.

But we are of opinion that an action at law, under the circumstances of this case, will not lie. The statute says that "any person to whom they are so liable may have an action on the case against any one or more of the said officers." Rev. Sta. c. 38, § 29. But taking this section in connection with § 31 of the same chapter, authorizing a bill in equity instead of such action at law; and with c. 81, § 8, giving this court jurisdiction in equity in all "cases in which there are more than two persons having distinct rights or interests, which cannot be justly and definitely decided and adjusted in one action at the common law;" we are of opinion that the plaintiffs' remedy is in equity.

Here all the directors are liable. It is like *Crease v. Babcock*, 10 Met. 533, except that in that case the defendants, stockholders, were liable in various amounts; whereas here the directors are liable for the whole amount for which any are liable. But the cases are alike in this, that there are various parties, having several and unequal claims against a common fund. That fund here consists, by statute, of the excess of the debt over the capital; and the claims of the creditors, by the case stated, greatly exceed that fund. *Harris v. First Parish in Dorchester*, 23 Pick. 112. *Atlas Bank v. Nahant Bank*, 23 Pick. 488. *Crease v. Babcock*, 10 Met. 531. *Thayer v. Union Tool Co.* 4 Gray, 75.

*Demurrers sustained.**

* See *Merchants' Bank v. Stevenson*, 5 Allen, 325.

Jacot v. Wyatt & another.

EDWARD H. JACOT *vs.* JOSEPH G. WYATT & another.

If notice of an intention to take the poor debtor's oath is served upon the creditor less than a mile from the place of examination, the time allowed him for travel, under *St. 1845 c. 444, § 4*, need only be a proportionate fraction of an hour.

A poor debtor who has, pursuant to *St. 1855, c. 444*, entered into a recognizance to deliver himself up within ninety days for examination, giving notice to his creditor and making no default, and to abide the final order of the magistrate, and who does attend before the magistrate, is not bound to surrender himself to the officer until the magistrate has certified a refusal to admit him to the poor debtors' oath.

ACTION OF CONTRACT upon a recognizance, entered into on the 16th of February 1856 by Wyatt as principal and the other defendant as surety before a commissioner of insolvency; reciting the recovery of a judgment by Jacot against Wyatt in the superior court, and the issuing thereon of an execution, upon which Wyatt was arrested and brought before the commissioner; and conditioned that Wyatt should "within ninety days deliver himself up for examination, giving notice to his creditor," as provided by *St. 1855, c. 444*," "and making no default at any time fixed for his examination, and abide the final order of the magistrate thereon."

The case was submitted to the judgment of the court upon the recognizance, the statements in which were admitted to be true, and the following facts:

On the application of Wyatt, the commissioner issued a notice to the plaintiff of Wyatt's desire to take the poor debtors' oath at the commissioner's office at ten o'clock in the morning on the 14th of May; and this notice was served at fifty minutes past eight o'clock on the same morning upon the plaintiff's attorney at his office, which was less than one sixth of a mile from the office of the commissioner.

Wyatt appeared at the time and place appointed, and was examined under oath by the commissioner, but the plaintiff did not appear, either in person or by attorney, and the examination was adjourned by the commissioner to May 15th, thence to May

Jacot v. Wyatt & another.

16th, and again to May 23d, at all which times Wyatt duly appeared, but the plaintiff appeared at none of them, either in person or by attorney; and on the 23d of May the commissioner refused to administer the poor debtors' oath to Wyatt; but the execution on which Wyatt had been arrested having been returned to court, and there being no execution or precept upon which the commissioner could indorse any certificate of refusal, the commissioner made no certificate or order in the case, and has made none since.

H. W. Paine & T. F. Nutter, for the plaintiff.

J. H. Bradley, for the defendants.

MERRICK, J. 1. The official notice, issued by the commissioner of insolvency to the plaintiff, that the defendant had been arrested on an execution in his favor, and desired to take the oath for the relief of poor debtors, was seasonably served upon his attorney. By the statute, the service must be made at least one hour before the time appointed for the examination of the debtor, with an additional allowance of time for travel at the rate of one day for every twenty-four miles to be travelled. *St. 1855, c. 444, § 4.* In both of these particulars the requirements of the law were complied with. The notice was served upon the plaintiff's attorney an hour and ten minutes before the time, and within one sixth of a mile of the place appointed for the debtor's examination. It is urged for the plaintiff that this was insufficient, because, upon a just interpretation of the provisions of the statute, he was entitled to one full hour for his travel; claiming that in the computation of the rate at which the allowance is to be made, the day is to be divided only into hours, and that fractions of hours are not to be taken into consideration. But there is no reason which calls for or can justify such a construction. The language of the statute is plain and unambiguous, and perfectly in accordance with the manifest intent of the legislature that relief should be promptly afforded to an imprisoned debtor. It does not contain a word which has a tendency to impose a limitation upon the division of a day into any known or appreciable sections of time, or to show that for this purpose hours are to be preferred to minutes.

Jacot v. Wyatt & another.

If it be suggested that, by resorting to the more minute division, the time allowed to the creditor may be, as it was in the present case, very brief, the decisive answer is, that was the very object and purpose for which the statute was enacted. Nothing is more apparent than that its chief end and design was to secure to the debtor, with the least practicable delay in the progress of the summary process which it provided, a discharge from his imprisonment. It may be well however to recollect, that, in conformity to the interpretation heretofore given to the provisions of a previous statute to which the present is in many respects similar, the plaintiff's attorney had in fact more than two hours' notice before the oath could have been lawfully administered to the debtor. He had the whole of the hour succeeding the one named in the notice, during which it was his right to appear and interpose objections to the allowance of the relief which was sought by the debtor. *Hobbs v. Fogg*, 6 Gray, 251.

2. But it is contended for the plaintiff that the recognizance entered into by Wyatt was forfeited because he did not deliver himself up for examination according to the condition upon which it was given. He appeared before the magistrate at the time and place fixed for that purpose; and also upon the several days to which the proceedings were adjourned, and was then always ready and prepared to yield obedience to whatever order should be made in the premises. But the plaintiff insists that this was insufficient; that the defendant, to avoid a breach of the condition of the recognizance, should have actually delivered himself up into the custody of the sheriff or his deputy.

We cannot think that a construction of the statute, which leads to this result, does justice to the language of its various provisions, or accords with its general scope and manifest purpose. As the first section declares that imprisonment for debt shall be forever abolished, so every provision which follows it shows an intention that, upon a compliance in the mean time with the requirements of law, no debtor shall be subjected to it, or detained in custody, until after a judicial determination that he is not entitled to the relief afforded by the statute. When

a person is arrested, he shall, as soon as he has had reasonable opportunity to procure sureties, be carried before a competent magistrate. § 4. That is a duty peremptorily required of the officer who holds him in custody. Then the debtor at his own election may enter into recognizance with sufficient surety, in a sum double the amount of the execution, that he will either appear at a time then to be fixed for his examination, or that he will thereafterwards within ninety days deliver himself up for that purpose, and will give notice to the creditor as required by law, will make no default, and will abide the final order of the magistrate thereon. § 9. These provisions seem to be decisive of the question. As soon as the debtor has entered into the required recognizance, he is at once relieved from the control of the officer; and it is plain that the arrest is not to be renewed while the proceedings in relation to the examination are still pending, nor until it has been brought to a close and a final order therein has been made. In the mean time he is to be free from all restraint by virtue of the execution. He has only to make no default, and to abide the final order of the magistrate. If in pursuance of that order the oath provided for the relief of poor debtors is administered to him, he is never to return into custody; and it is only when it has been duly adjudged that he is not entitled to that relief, that the right of the creditor to insist upon his imprisonment under the execution, or of the officer to subject him to it, can revive. A different construction of the statute, and one which should lead to the conclusion that the debtor is to deliver himself up to the sheriff and become actually and in fact his prisoner at an earlier period in the proceedings, and even before his examination has been commenced, is directly opposed to its general design and the great object of securing the liberty of the debtor sought to be accomplished by it, and must be considered a mistaken and erroneous interpretation of its provisions.

There is another consideration leading to the same result, which it may be proper to mention, although it is not necessary to enlarge upon it. No duty is imposed upon the debtor, either to keep watch of the officer or of the disposition which he shall

Wyeth v. Richardson.

choose to make of the process committed to him for service. He cannot be expected therefore, when he is ready in compliance with the condition of his recognizance to deliver himself up for examination, to follow the officer in his round of duty ; nor required, at all events, and upon peril of its forfeiture, to be successful in bringing himself into his presence. He is, on the other hand, bound to give due and legal notice to the creditor, his agent or attorney, who may, if he desires it, see that the officer is present when the final order is made. If he does not choose to attend or to place himself in a position where he can execute his precept, there can afterwards be no ground for asserting that the debtor has failed to abide the final order, or has in any way been guilty of a breach of the condition of his recognizance.

In the present case no final order was ever in fact made. The defendant continued his attendance before the magistrate whenever and as long as he was required to do so ; and when the proceedings of the magistrate ceased, neither the execution nor the officer was present ; and the debtor therefore necessarily continued free and unmolested. It was through no fault of his, either in making default, or in manifesting an unwillingness to abide the final order, that he was not again taken upon the execution. There was therefore no forfeiture of his recognizance, and of course the present action against him cannot be maintained.

Judgment for the defendants.

JONAS WYETH vs. SAMUEL W. RICHARDSON.

Exceptions do not lie to the discharge of a prisoner on *habeas corpus* by a single judge.

HABEAS CORPUS. The petitioner was arrested under a warrant issued against him by the governor of Massachusetts on the requisition of the governor of Iowa. After the issuing of this writ, the governor revoked his warrant, and the prisoner

Wyeth v. Richardson.

demanded his discharge. The respondent contended that the governor had no power to revoke such a warrant once issued. But *Bigelow*, J. ruled otherwise, and discharged the prisoner. The respondent alleged exceptions.

J. C. Park, for the respondent.

R. Choate & J. A. Andrew, for the petitioner.

SHAW, C. J. The general principles of law are opposed to the allowance of exceptions in this case. The great purpose of the writ of habeas corpus is the immediate delivery of the party deprived of personal liberty. The allowance of exceptions would be inconsistent with the object of the writ. The consequence of allowing exceptions must be, either that all further proceedings be stayed, which would be wholly inconsistent with the purpose of the writ; or that the exceptions must be held frivolous, and judgment rendered *non obstante* for the discharge of the party, in which case the exceptions would be unavailing. The allowance of exceptions being thus inconsistent with the very purpose of the writ, the conclusion must be that the exceptions do not lie.

Section 26 of chapter 81 of the Revised Statutes, authorizing any question of law arising "in any trial or other proceeding, either of a civil or criminal nature, at law or in equity," before this court when held by one justice, to be reserved and reported for the consideration of the full court, applies to another class of cases. The right to except to the opinion of one judge in cases of divorce stands on the special provision of Rev. Sts. c. 76, § 7.

In the present case, we do not mean to intimate that the party was not rightly discharged from custody, nor that the executive could rightfully revoke a warrant issued for the arrest of a fugitive from justice from another state. Not being within the jurisdiction of the court, we pass no judgment on that question.

Power given to a judge in vacation in cases of *habeas corpus* may be exercised without being in court or making the case a matter of record. It is a special power, conferred by statute, to be used by a judge as judge, not as a court; though if the court is in session when the writ is returned, the judge may

 Reed & another v. Neale.

adjourn the case into court. Rev. Sts. c. 111, § 9. There is no appellate power over such decisions made at chambers by a justice of this court. For similar cases in the supreme court of the United States, see *In re Metzger*, 5 How. 176; *In re Kuine*, 14 How. 103.

The court will exercise no appellate jurisdiction; but where they have authority to issue the writ, if upon its return it appears that the party is committed by a court of competent jurisdiction under a regular process, this court will not inquire into the regularity of the judgment on which he is committed.

A more particular examination of the provisions of the statute confirms our conclusion that these exceptions must be dismissed. The writ of *habeas corpus* is to be issued "without delay," and returnable "forthwith," either before this court or before any one of the justices thereof. Rev. Sts. c. 111, § 4. "The court or judge shall, without delay, proceed to examine the causes of the imprisonment or restraint." § 18. "The court or judge shall proceed, in a summary way," to examine the causes of the imprisonment or restraint, and to hear all parties for or against it, "and thereupon to dispose of the party as law and justice require." § 21. *Exceptions dismissed.**

GEORGE REED & another vs. ALONZO F. NEALE.

A grocer's stock in trade is not exempt from attachment under St. 1855, c. 264.

ACTION OF TORT by grocers against a deputy sheriff for attaching their stock in trade on mesne process against them.

At the trial in the superior court of Suffolk at March term 1856 the plaintiffs claimed that the property was exempt from attachment under St. 1855, c. 264. But *Abbott*, J. instructed the jury

* See St. 1859, c. 196, §§ 27, 38, 58.

 Coburn v. Boston Papier Maché Manufacturing Company.

"that, it being admitted that the plaintiffs were not mechanics and did not hold the attached property for their use in any mechanical business or avocation, but were traders and held the attached property for sale and use as traders, they could not in any event recover." The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

H. M. Parker, for the plaintiffs.

I. W. Beard, for the defendant, was not called upon.

BY THE COURT. This case is covered by previous decisions. The plaintiffs' stock was liable to attachment. *Smith v. Gibbs*, 6 Gray, 298. *Wilson v. Elliot*, 7 Gray, 69. *Gibson v. Gibbs*, 9 Gray, 62. *Exceptions overruled.*



CHARLES COBURN vs. BOSTON PAPIER MACHÉ MANUFACTURING COMPANY.

Proving a claim against a corporation in insolvency under *St.* 1851, c. 327, and receiving a dividend thereon, will not bar a suit against the corporation for the rest of the debt.

ACTION OF CONTRACT on three promissory notes. Trial and verdict for the plaintiff in the superior court of Suffolk at May term 1856, before *Nash, J.*, who signed a bill of exceptions, the material parts of which appear in the opinion.

C. G. Thomas, for the defendants, cited *Angell & Ames* on Corp. §§ 638, 779, and cases cited; *Grant* on Corp. 304, 305; *Greeley v. Smith*, 3 Story R. 657; *Slee v. Bloom*, 19 Johns. 474, 475, 477; *Mayor &c. of Colchester v. Brooke*, 7 Ad. & El. N. R. 383; *The King v. Pasmore*, 3 T. R. 221, 222; *Regina v. Mayor &c. of Tregony*, 8 Mod. 129; *Dearborn v. Ames*, 8 Gray, 1; *St.* 11 & 12 Vict. c. 45.

B. Dean, for the plaintiff, was stopped by the court.

SHAW, C. J. The defendants are a manufacturing corporation, and this suit is upon three promissory notes, of which the company are promisors. It appears by the answer that the corporation were placed in insolvency under the *St.* of 1851, c. 327; that the proceedings were regularly commenced

Coburn v. Boston Papier Maché Manufacturing Company.

and conducted before a commissioner of insolvency for the county of Norfolk, debts were proved, assignees chosen, the assignment made, and one dividend declared of twenty eight per cent. The plaintiff proved the debt now sued, and received a dividend. The defendants rely upon these facts as affording a defence to the suit.

But the statute makes no provision for any discharge of the insolvent corporation, and this is the characteristic distinction between this and the insolvent law of the Commonwealth in case of individual insolvent debtors. The reason for this distinction is not very apparent; probably the reason is, that after the whole of the property of a corporation is sequestered, and even the franchise, if that is of value, a judgment against the corporation, so far as the corporation is further liable, would be worthless. If there be a collateral liability, by statute or by special agreement or undertaking on the part of any other party, such liability would be in the nature of a suretyship, and so a discharge of the principal debtor would not, by the general principles of the insolvent law, discharge or release such suretyship. But if there be persons so situated as contingent sureties, rendering it necessary first to get a judgment against the corporation, as individual stockholders, sureties on bonds to dissolve attachments, or the like, then the corporation have no justifiable ground for saying that such creditors shall not avail themselves of such contingent liability by a judgment against the corporation for the unpaid balance of their debt. Of course, whatever the creditor obtains by way of dividend must first be deducted; and the other parties are to be pursued under this limitation, that no creditor shall receive from all such sureties and parties more than one full satisfaction and all costs.

The defendants' counsel contends and argues that, though they have appeared by attorney in this suit and answered, yet that the proceedings in insolvency amount to a total extinguishment of the corporation, and that the suit must therefore necessarily abate. But the court are of opinion, that there are no provisions in the statute and no circumstances in the case to warrant this conclusion. There is nothing in the proceedings

Wetherbee v. Martin & another.

to prevent their continuing to accomplish the end and purpose of their existence, at least until their franchise, or right to act as a corporation, is sold under one of the provisions of the statute, if indeed such sale would have the effect. In general, such a franchise under such circumstances would be of little or no value; though circumstances may exist which would give it some value.

The corporation, notwithstanding the proceedings in insolvency, may have assets sufficient to pay all their debts; and then no impediment would exist, before a surrender pursuant to law, or a forfeiture ascertained and declared by a proper judicial proceeding, from resuming their business. Or if their capital is impaired or wholly gone, this seems to be no reason, before such surrender or forfeiture, to prevent the members from furnishing renewed capital, and then proceeding to use their corporate powers.

But a strong reason why these proceedings do not work a dissolution is, that if the legislature had so intended they would have so declared.

Exceptions overruled.



JOHN WETHERBEE, JR. vs. RICHARD MARTIN & another.

The assignee of an insolvent debtor may maintain an action in his own name upon a bond for the liberty of the prison limits, made to the insolvent after the appointment of the assignee, to obtain a release from arrest on an execution issued before such appointment, upon a judgment on a debt which would pass to the assignee by the assignment.

A minute upon a magistrate's book of a continuance of the examination of a poor debtor, not in the magistrate's handwriting, nor signed by him, and of which he has no independent recollection, is not sufficient evidence of a legal adjournment of the hearing.

ACTION OF CONTRACT, by the assignee in insolvency of John M. Way, upon a bond for the liberty of the prison limits, made to said Way by Richard Martin as principal and Jeremiah Martin as surety on the 27th of March 1855, after the arrest of Richard on an execution issued on the 12 h, on a judgment recovered against him by Way on the 7th of March.

Wetherbee v. Martin & another.

At the trial in the superior court of Suffolk at May term 1856, before *Nash, J.*, the defendants contended that Richard Martin had been duly discharged by taking the poor debtors' oath.

The plaintiff introduced an assignment to him from a commissioner of insolvency, dated March 8th 1855, of all the estate which Way had, or was interested in or entitled to, on the 10th of February 1855, being the date of the first publication of the notice of Way's insolvency, and before which the debt had accrued and been put in suit on which Richard Martin was committed.

The defendants contended that, as the bond declared on was given long after said assignment, the plaintiff had no interest therein, and could not maintain the action; and moved for a nonsuit. But the judge overruled the motion, and ruled that the plaintiff, as assignee, was entitled to sue on the bond in his own name.

A justice of the police court of Boston, who administered the poor debtors' oath to Richard Martin, being called as a witness for the defendants, testified "that he kept no record; but that it appeared from certain minutes on a loose piece of paper (copied into a poor debtors' book) that said Martin applied to him to administer the poor debtors' oath; that the parties appeared on the 27th of April 1855 at twelve o'clock, and the case was continued to May 4th at nine o'clock in the morning; and then there was an entry on said piece of paper, 'Con. May 7, 12 clk,' at which time the oath was duly administered and a certificate granted; that he had no independent recollection about the case, and could testify nothing except from this writing; that after reading said memorandum he had no independent nor any recollection; that he had no doubt the adjournment was duly and properly made; but that he had so many cases of the kind, he had to rely solely on such minutes; and that this minute was not made by him." And each of the other police judges testified that this minute was not in his own handwriting.

The judge instructed the jury "that these minutes of the magistrate were not evidence; that he might refer to them to

Wetherbee v. Martin & another.

refresh his memory ; but that as the magistrate, after examining them, had no recollection of the case, they could not be received as evidence, as they were not a record."

The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. Field, for the defendants.

R. H. Dana, Jr., for the plaintiff.

DEWEY, J. The general rule is conceded, that the obligee in a bond is alone authorized to maintain an action thereon. But in the case of deceased persons, or those whose estates have passed into liquidation under bankrupt or insolvent laws, a modification of this rule exists. The principle of the rule is not disregarded, but the law allows the legal representative of the party to do those things which might in other cases be done by the obligee solely. Our statute of insolvency is very full and comprehensive in its terms, giving to the assignee all the property, real and personal, of the insolvent, and also all the like remedies to recover the debts and effects of the insolvent in the name of such assignee. *St.* 1838, c. 163, § 5. Under this provision, no question exists as to the right of the assignee to sue in his own name all choses in action of the insolvent that pass to the assignee, and to come in and prosecute in his name all actions pending in the name of the insolvent, that have reference to the assets for distribution.

In the present case, no question could be made of the right of the assignee to sue the bond in his own name, if it had been executed before the time of the first publication of the insolvency. The difficulty in the case arises from the fact that this bond was executed on the 27th of March 1855, and the relation of obligor and obligee between the parties to this bond arose after the party went into insolvency, and at a time when new debts to the insolvent, or contracts made with him, would not enure to the assignee for the benefit of the creditors.

Had this been in fact such new debt, accruing subsequently, and not available to the assignee for the benefit of creditors, the objection taken to maintaining the action in the name of any other person than the obligee would certainly defeat this

Wetherbee v. Martin & another.

action. It then becomes important to ascertain the precise nature of the present action, and to decide to whom the avails of this bond belong, and also whether the assignee has, by any act of his, deprived himself of the right to institute a suit on the same in his own name.

It appears that the insolvent, John M. Way, at the time of the institution of the insolvent proceedings, on the 10th of February 1855, had an action pending for the recovery of a demand that would pass to his assignee, and that on the 7th of March judgment was rendered in that action in favor of said Way; which was necessarily so rendered, as at that time there was no assignee, and no person who could come in and prosecute the action, for the assignee was appointed on the 8th of March. Of this judgment, thus rendered, the assignee attempted to enforce payment by the ordinary process of execution, and arrest of the body of the debtor. The debtor, when arrested, applied for the benefit of the prison limits, as he had the right to do, and complied with the provisions of law in that respect by giving a proper bond to the judgment creditor. The bond was therefore properly given. But it was a bond in the name of Way to secure the surrender of a party arrested on an execution for a debt that passed to Way's assignee, and a claim that the assignee might enforce. A suit might have been brought on such judgment in the name of the assignee; and, as it seems to us, the debt being a part of the assets of the insolvent, to be administered by the assignee, any further legal processes that might be required, in consequence of the debtor's availing himself of the prison limits, to enforce payment of the same, may be issued in the name of the assignee.

The only other exception that was urged at the argument was to the ruling of the court, that the paper introduced as minutes of the magistrate, in the proceedings in reference to taking the poor debtors' oath, was not evidence. Confining ourselves strictly to the exception as presented, and without expressing any opinion upon the weight of the independent evidence, the court are of opinion that the paper offered was not evidence of an adjournment of the proceedings before the magistrate, as it

Power v. Fenno & another.

was not a record, nor a minute upon a docket which was afterwards to be extended into a record, nor a paper drawn up by the magistrate.

Exceptions overruled.

ELIZA POWER vs. JOHN F. FENNO & another.

A bond, conditioned that the accused in a bastardy process shall appear and answer to the complaint and abide the final order of the court thereon, is discharged by his attendance at court so long as the action is pending and at the final order, and his subsequent arrest at the instance of the complainant and committal to prison under that order for a failure to give bond to perform it.

The presence of the respondent in court pending a bastardy suit, and at the passing of the final order, may be proved by parol evidence.

ACTION OF CONTRACT on a bond, given pursuant to Rev. Sts. c. 49, § 1, and conditioned that John Donahue should appear at the next court of common pleas and answer to the complaint of Eliza Power, of being the father of her bastard child, and should abide the order of said court thereon.

At the trial in the superior court of Suffolk at May term 1856, it appeared that the complaint was tried and Donahue found guilty in the court of common pleas on the 2d of March 1855, and the final order of court passed on the same day; that the court adjourned on the 13th, and on the 25th of March a warrant was issued on the complainant's motion, upon which Donahue was arrested and committed on the 28th, and, at the expiration of one hundred and twenty days, discharged on taking the poor debtors' oath.

The defendants offered evidence that during the trial of the complaint and at the passing of the final order Donahue was present in court. The plaintiff objected, upon the ground that this evidence, if relevant for any purpose, was so only to show a surrender in court, which could not be proved except by record. But *Nash, J.*, admitted the evidence; and instructed the jury, "that if the respondent was openly in court during the trial, and at the time of and until after final judgment, when the final order was passed; and his presence was known to the com-

Doherty v. Brown.

plainant and her attorney; and the respondent was then and there ready to be taken into custody, if such motion had been made by the complainant; the condition of the bond was saved, and the verdict should be for the defendants." The jury returned a verdict accordingly, and the plaintiff alleged exceptions.

J. Q. A. Griffin, for the plaintiff.

S. C. Maine, for the defendants.

SHAW, C. J. The obligation of Donahue was to appear in court and abide the order. It appears that he was there personally present when the order was made. He was committed, either then or afterwards, in pursuance of that order. It was by the act of the complainant that he was so committed, and she is estopped to say that he did not abide the order of the court to pay or be committed. *Exceptions overruled.*



MARY DOHERTY vs. JOHN L. BROWN.

A declaration in slander for charging the plaintiff with being "a whore and a common prostitute" is not supported by proof of other words amounting to a general charge of unchastity.

SLANDER. The declaration averred: 1st. "That the defendant publicly, falsely and maliciously accused the plaintiff of the crime of fornication, by words spoken of the plaintiff substantially as follows; viz: 'That you' (meaning the plaintiff) 'are a whore and a common prostitute, and you' (meaning the plaintiff) 'associate with prostitutes.'" 2d. "That the defendant publicly, falsely and maliciously accused the plaintiff of the crime of fornication, by words spoken of the plaintiff substantially as follows: 'She' (meaning the plaintiff) 'is a whore, a damned whore, and a common prostitute.'" "

At the trial in the superior court of Suffolk at March term 1856, *Nelson, C. J.*, instructed the jury, "that the plaintiff, to obtain a verdict on the first count, need not prove the identical

Doherty v. Brown.

words set forth and specified therein, if other words were proved to have been said by the defendant and concerning the plaintiff, amounting to a general charge of unchastity, which would be enough to support that count." The jury returned a general verdict for the plaintiff, and the defendant alleged exceptions.

H. C. Hutchins, for the defendant.

T. Willey, for the plaintiff.

THOMAS, J. The instruction of the court "that the plaintiff, to obtain a verdict on the first count, need not prove the identical words set forth and specified therein, if other words were proved to have been said by the defendant of and concerning the plaintiff, amounting to a general charge of unchastity," was erroneous.

1st. The words set out in the declaration must be, if not precisely, yet substantially proved. The object of this mode of pleading is to give notice to the defendant of what is to be proved, not merely the nature of the charge, but the language in which it was uttered. The evidence therefore must show the charge to have been made substantially as alleged, so far even as the words are concerned. It cannot be shown that the same charge was made, but in another form, and in the use of substantially different language. Such a rule would wholly defeat the purpose of the statute in requiring the words of the charge to be spread upon the record.

2d. The proof of making a charge of unchastity against the plaintiff does not sustain the allegation in the first count that the defendant charged the plaintiff with being a common prostitute. They are not the same charge. Supposing the words as set out to have been proved, it is plain that proof of the unchastity of the plaintiff would not be a justification of the charge made.

3d. The jury having found a general verdict on the two counts, the instruction cannot be deemed immaterial. They are not two different modes of stating one and the same slander, but two charges of slander; not one cause of action in different counts, but different causes of action in different counts.

Exceptions sustained.

CHARLES SMITH & another vs. JOHN PHILBRICK.

The presentment of a promissory note at the place of its date is sufficient, in the absence of proof that the holder at its maturity knew that the maker resided elsewhere.

MERRICK, J. This is an action brought by indorsers against a prior indorser to recover the contents of a promissory note. At its maturity the holder placed it in the hands of a notary public, who by his direction went with it to the place of business which the maker formerly occupied in the city of Boston, and there made inquiry for him, in order, if he were found, to present it to him for payment. He was not found, and no demand of payment was made. The defendant insists that he is not liable as indorser, and that this action cannot be maintained.

The note is dated and was made at Boston, where the maker then was on a visit for a temporary purpose only. He then and has ever since resided at Port Lavacca in the State of Texas, where he had his only place of business. At the trial, no evidence was produced to show whether the plaintiff, or any of the subsequent holders of the note, knew that the maker's residence and place of business were in Boston, or elsewhere; there was no evidence whatever upon that question.

The indorser of a note is certainly never chargeable with its payment, if there has been neither a demand of payment made on the maker, nor due diligence used to find him for the purpose of presenting it to him for payment. The inquiry then is, whether, under the particular circumstances of this case, due diligence is shown to have been used to find the maker, so that the note could be presented to him and its payment demanded. What was it the duty of the holder to do? It is laid down by Chancellor Kent as a general rule, that "if there be no other evidence of the maker's residence than the date of the paper, the holder must make inquiry at the place of the date;" and he adds that "the presumption is, that the maker resides where the note is dated, and that he contemplated payment at that

place." 3 Kent Com. (6th ed.) 96. Story on Notes, § 236. *White v. Wilkinson*, 10 Louis. Ann. R. 394.

Assuming this to be the rule, there is no doubt that due diligence was used by the holder. He was not required to carry or to send his note to Port Lavacca for presentment; but only to make all proper inquiries at the place where it bore date to find the maker. Those inquiries were made with sufficient fulness and carefulness at Boston. It is not pretended that any thing was omitted, which, if done, would have been of the least utility in collecting the note, or protecting the rights of the indorser. Any further inquiry beyond that which was made by the notary would necessarily have been wholly fruitless.

If the place of the maker's residence had been known by the holder at the maturity of the note, it might perhaps have been incumbent on him to have forwarded it to Port Lavacca for presentment, or to have used all due diligence to have done so. That would be in conformity to the decision of the court in the case of *Taylor v. Snyder*, 3 Denio, 145, which is relied on by the defendant. In that case it appeared that the plaintiff well knew the maker's place of residence, which was out of the state where the note was made and dated; and it was held, that under such circumstances the indorser was discharged, because there was no demand of payment on the maker, and no inquiries or efforts were made to find him, except at the place where it bore date, in order to present the note to him for payment.

This fact of knowledge of the place of the indorser's residence distinguishes the present from the case of *Taylor v. Snyder*, and leaves it to be determined upon the general rule laid down by Chancellor Kent. The defendant insists that the plaintiffs ought to have been required, if they would avail themselves of that rule, to show affirmatively that both they and all the subsequent holders of the note were ignorant of the fact that the maker of the note had no residence or place of business in the city of Boston. This is not so. The presumption is, as has been before stated, in the absence of all other evidence upon the subject, that the residence of the promisor is at the place where the paper to which he subscribes his name is dated. Either party

Tremlett & others v. Hooper & others.

may controvert this presumption and overcome it by proofs introduced. But no evidence to the contrary having been laid before the court, this presumption is to stand; and the

Defendant's exceptions must be overruled.

B. Dean, for the defendant, cited *Taylor v. Snyder*, 3 Denio, 145; *M'Gruder v. Bank of Washington*, 9 Wheat. 598; *Wheeler v. Field*, 6 Met. 290; *Bank of Orleans v. Whittemore*, 20 Law Reporter, 333; *Heylyn v. Adamson*, 2 Bur. 676; *Freeman v. Boynton*, 7 Mass. 483; *Warren Bank v. Parker*, 8 Gray, 221.

T. F. Nutter, for the plaintiffs.



THOMAS TREMLETT *vs.* ROBERT HOOPER & others.

JAMES PARSONS *vs.* SAME.

SOMERSET POTTERS WORKS *vs.* SAME.

of a partnership, whose principal business is to purchase supplies for and sell iron manufactured at iron works owned by one of the partners, becomes insolvent, a claim for supplies sold and delivered to the partnership, without knowledge that that partner only was interested in the works in which they were to be used, can be proved against the partnership estate only, under *St.* 1838, c. 168, § 21, and not against the separate estate of that partner.

APPEALS from decrees of a master in chancery, under proceedings in insolvency commenced on the 24th of November 1847, in the matter of the estate of Horace Gray and Nathaniel Francis, partners and insolvent debtors, whose assignees the appellees were, disallowing claims offered for proof against Gray's separate estate.

The cases of Tremlett and the Somerset Potters Works were submitted to the judgment of the court upon agreed statements of facts.

The case of Parsons was tried before *Merrick, J.*, a verdict taken by consent for the appellees, and the case reserved for the whole court, with an agreement that if upon the evidence, and upon drawing just inferences, the jury under legal instructions could properly have returned a verdict for the appellants,

Tremlett & others v. Hooper & others.

there should be a new trial; otherwise, judgment upon the verdict.

So much of the facts of each case as is necessary to the understanding of the questions of law decided, is stated in the opinion. The cases of Parsons and the Somerset Iron Works were argued at March term 1856, and Tremlett's at this term.

S. E. Sewall, R. Choate & C. W. Loring, for the appellants, cited 2 Kent Com. (6th ed.) 631; Story on Agency, §§ 160 *a*, 266, 267, 291, 292, 446, 449, note; Paley on Agency, (4th Amer. ed.) 243, 247 & note; *Nelson v. Powell*, 3 Doug. 410; *Railton v. Hodgson*, 4 Taunt. 576; *Kymer v. Suwercropp*, 1 Campb. 109; *Thomson v. Davenport*, 9 B. & C. 78; *Higgins v. Senior*, 8 M. & W. 843; *Beckham v. Drake*, 9 M. & W. 95; *Hyde v. Wolf*, 4 Louisiana, 234; *Upton v. Gray*, 2 Greenl. 373; *Perth Amboy Manuf. Co. v. Condit*, 1 Zab. 659; *French v. Price*, 24 Pick. 21, 22; *Raymond v. Crown & Eagle Mills*, 2 Met. 319; *Sprague v. Gillett*, 9 Met. 91; 1 Bell Com. (4th ed.) § 418; *Rich v. Coe*, Cowp. 636; *Wilson v. Hart*, 7 Taunt. 295; *Precious v. Abel*, 1 Esp. R. 350; *Conro v. Port Henry Iron Co.* 12 Barb. 53; *Melledge v. Boston Iron Co.* 5 Cush. 170; *Porter v. Talcott*, 1 Cow. 359; *Ex parte Seddon*, 2 Cox Ch. 49; *Zerrano v. Wilson*, 8 Cush. 424; *Alcock v. Hopkins*, 6 Cush. 484; *Butts v. Dean*, 2 Met. 76; *Denston v. Perkins*, 2 Pick. 86; *Chesterfield Manuf. Co. v. Dehon*, 5 Pick. 7.

S. Bartlett & C. B. Goodrich, for the appellees.

DEWEY, J. It is conceded that Tremlett, the appellant in one of these cases, in June 1847 made a contract with Horace Gray & Co. for the sale to them of a large quantity of coal, for which they were to pay by giving their notes payable in four months, and that he gave credit to the partnership and treated with them as the vendees of the coal, and the party from whom alone he expected payment therefor. The goods were delivered, and the notes received therefor as stipulated.

No question is made of the liability of Horace Gray & Co. on these notes, nor of the right of the appellant as their creditor to file his claim, and receive his *pro rata* dividend. But in the settlement of the estate of Horace Gray & Co. and of Horace

Tremlett & others v. Hooper & others.

Gray alone, under the insolvent laws, it has been found that the private estate of Horace Gray will pay a much larger dividend to its appropriate creditors than the partnership assets will pay to the partnership creditors. The appellant desires therefore to withdraw his proof heretofore made against the partnership estate, and prove his claim against the separate estate, and thus change his relation from that of a creditor of the partnership to that of a creditor of Horace Gray alone.

In support of his right so to do, he asserts and endeavors to maintain the position that Horace Gray was a concealed principal at the time of making the contract and the delivery of the coal, and Horace Gray & Co. were only agents; and that upon the discovery of that fact, before unknown to him, he may resort to such concealed principal.

As a case for the application of the familiar principle of resorting to a concealed principal who has acted through an agent, with a view of charging thereby a third person not known in the original contract, the case has this peculiar feature; that Horace Gray, the alleged concealed principal, was one of the agents dealt with, and was personally liable upon the express contract; and, independently of the provisions of the insolvent law, and the fact that Horace Gray & Co. and Horace Gray are the subjects of proceeding under that law, the private estate of Horace Gray would, under the contract as made and in the form it was made, have been to the full extent liable on the notes given.

But assuming that it is open to the appellant to show that Horace Gray alone was the real purchaser, we are brought to the inquiry whether that fact is established by the evidence.

To some extent this subject has been considered by this court in the case of *Somerset Pottery Works v. Minot*, 10 Cush. 592. It is to be considered as settled that there was such a legal copartnership as Horace Gray & Co., consisting of Horace Gray and Nathaniel Francis. It was a partnership transacting partnership business in some respects in a manner peculiar. The profits of the firm were in the form of commissions to the amount of nine thousand dollars for their duties as con-

nected with various establishments. They transacted business as a firm, bought and sold as a firm, and used the partnership name in the securities given for the purchases made to supply these various establishments. The copartnership did not own or lease any of these various establishments but undertook to furnish the supplies through purchases made on their own account. It was seriously questioned in earlier cases whether there really was any copartnership, or whether the purchases were not by Horace Gray alone, or by those who owned or carried on the establishments for which coal and iron were furnished. Upon much consideration, the court came to the opinion that there was such a copartnership, and that there attached to it the usual incidents of a copartnership, vesting in them all the property thus purchased by them, and creating the same liabilities to their creditors that arise in ordinary cases. Hence the fact that the merchandise purchased was found to have been required to supply a particular establishment was not supposed to make such establishment the principal debtor, and Horace Gray & Co. the agents of a concealed principal. The cases of principal and agent were not considered as applicable to the purchases by Horace Gray & Co. The firm were the principals in the purchases. Hence it was held, that as to articles furnished to supply the wants of third persons, Horace Gray & Co. were the principals; and that coal or iron furnished through them to the Massachusetts Iron Company was not properly chargeable to the latter, although it went directly to their use. *Bevan v. Massachusetts Iron Co.* Suffolk, March term 1852. It is true that the purchase in that case was with reference to supplying various works, but the precise claim was solely for that which went to the use of the Massachusetts Iron Company.

The only point of distinction, that is material to be considered, arises from the fact that the alleged concealed principal in the present case is Horace Gray, the same individual who was a member of the firm of Horace Gray & Co.; and an attempt is made to distinguish the case on that account, and thereby create an original liability on the part of Horace Gray as sole debtor

Tremlett & others v. Hooper & others.

As a member of the firm of Horace Gray & Co. Horace Gray is of course liable as an original purchaser, and all his property is bound for the payment of his various debts. But the inquiry is whether this was a partnership liability, or an individual liability? Now, as it seems to us, the character of the business of Horace Gray and Nathaniel Francis having been decided to be that of a copartnership, whose leading business it was to supply various establishments with coal and iron, such purchases, so made by them to effect that object, were alike partnership purchases, whether the articles were purchased by them to supply the Massachusetts Iron Company, or the Ulster Iron Works carried on by Horace Gray. In both cases the partnership made the purchases upon their own orders, gave their own negotiable notes for them, and in some form charged the party to whom such articles were delivered therefor. The books they kept were the books of Horace Gray & Co.; not the books of the Massachusetts Iron Company, or Horace Gray, kept by their agents. The notes they gave in the present instance were given on account of deliveries of coal, part of which went elsewhere than to Horace Gray's works at Pompton and Saugerties. The plaintiff had from time to time theretofore sold to Horace Gray & Co. large quantities of coal for the various purposes for which they required them, and was the holder of their notes therefor to a large amount, which are not claimed to be allowed against the estate of Horace Gray.

We do not perceive any sufficient reason for withdrawing that portion of the indebtedness of Horace Gray & Co., which arises from that portion of the coal forwarded directly to Saugerties for the Ulster Iron Works, or at Newark for the Pompton Iron Works, from the other sales made for other establishments. The dealings in both cases were with the copartnership, and so understood to be, and secured to the vendors all the benefits arising therefrom. They might have been much greater than those accruing from the separate liability of Horace Gray. It happens that the situation of the property is such that it is otherwise. In the opinion of the court, upon the case stated, the master in chancery properly refused to allow the demand

of Tremlett as a claim against the separate estate of Horace Gray.

In the case of Parsons, as in that of Tremlett, the creditor puts his case substantially upon the ground of a concealed principal, assuming that Horace Gray & Co. were merely agents for Horace Gray in making the purchases from the appellant of the bricks for which he seeks to recover against the separate estate of Horace Gray. In the view we have taken of the facts, such was not the real character of the transaction. The firm of Horace Gray & Co. were a real firm doing business as such, and making extended purchases for supplying the calls of those who looked to them for their supply. It is true in the present case that the bricks were bought of Parsons for the works at South Boston, and were used there, and that the firm had no interest as owner or occupant of those works. The same was true of all the various establishments which they supplied. But nevertheless they undertook a general business of purchasing on their own account large amounts of merchandise, charging over to those who had the same the proper indebtedness therefor on their partnership books.

In the case of Parsons, the contract was made in writing with the partnership, the account was rendered to the partnership, and agreeably to the terms of the contract, on the delivery of the bricks, one half of the amount due therefor was paid in cash by the firm out of the funds of the firm, and a partnership note payable in three months given for the balance. That the bricks were to be delivered at the Massachusetts Iron Works at South Boston does not vary the character of the transaction. We perceive no reason for coming to a different conclusion in the present case from that to which we have come in Tremlett's case. In our opinion, upon all the proposed evidence that was competent and admissible, and under proper instructions, the jury could not properly have returned a verdict for Parsons.

The case of the Somerset Potters Works is the same in principle as that of Parsons. The only difference is that, in relation to a small portion of the bricks delivered, no promissory note had been given, and as to so much of the demand, that

Fisher & another v. Minot.

objection cannot be urged. But all the bricks were delivered upon the written orders of Horace Gray & Co., and charged to them upon the books of the appellants. The entire cause of action is of similar import as to its substantial foundation and the real parties to it. The result must be therefore that the appellant's demand is not provable against the separate estate of Horace Gray.

Decrees affirmed.



WILLIAM L. FISHER & another vs. WILLIAM MINOT, Master in Chancery.

Materials charged and shipped by a partnership in their usual course of business, to works of one partner, on the day of the failure of all the partners, are to be treated as the property of that partner, and not of the partnership, in marshalling their assets in insolvency, under St. 1838, c. 163, § 21.

PETITION in equity under St. 1838, c. 163, § 18. The arguments were made at March term 1856. The case is stated in the opinion.

J. L. English, for the petitioners, cited St. 1838, c. 163, § 21; *Swain v. Sheppard*, 1 M. & Rob. 223; *Cooper v. Smith*, 15 East, 103; *Wright v. Dannah*, 2 Campb. 203; *Woodbury v. Long*, 8 Pick. 543; *Kendall v. Samson*, 12 Verm. 515; *Sackett v. Lowell*, 32 Maine, 164; *May v. Gentry*, 4 Dev. & Bat. 117; *Tooke v. Hollingworth*, 5 T. R. 215; *Atkin v. Barwick*, 1 Stra. 165; *Bourne v. Cabot*, 3 Met. 305; *Martin v. Pewtress*, 4 Bur. 2477; *Shumway v. Rutter*, 7 Pick. 56; *Lanfear v. Sumner*, 17 Mass. 110; *Shurtleff v. Willard*, 19 Pick. 202.

S. Bartlett & C. B. Goodrich, for the assignees, were stopped by the court.

E. R. Hoar, for intervening creditors.

SHAW, C. J. This is a petition in the nature of an appeal from the decision of the master in chancery, disallowing the claim of the petitioners against the separate estate of Horace Gray. Various points were raised upon the case stated; but at

the argument all were waived except the one stated in the last paragraph of the agreed statement.

It appears by the agreed statement that Horace Gray alone was carrying on a separate business in the manufacture of iron at Pembroke in the State of Maine; that about the time of the failure, November 20th 1847, the firm of Horace Gray & Co. shipped from Boston, in pursuance of a previous course of business, on board of Schooners Lucy and Yeso two cargoes of iron, which arrived at Pembroke, and were sold by the assignees as part of the estate of Horace Gray, and credited to the separate estate \$3592.24. The same was charged in the books of Horace Gray & Co. to "Pro. Pemb. Iron Works," in the same manner as other pig iron and coal thus charged, which had previously been sent to said Pembroke Iron Works.

The claim is to require the assignees to reform their account by crediting this sum to the account of Horace Gray & Co. and not let it stand, as the assignees have placed it, to the credit of the separate estate of Horace Gray.

This claim is founded on the ground that at the time of the first publication these cargoes of iron, acknowledged to have been property of Horace Gray & Co. to near the time, had not been appropriated and set apart to the separate use of Horace Gray, but remained the property of the company.

It is plain that the course of business was for Horace Gray & Co. to purchase pig iron, as they could most advantageously; and when sent to either of Mr. Gray's iron works, to charge it to iron works named, but in effect to him personally, using such names of his works as to enable him to know which establishment in particular they were sent to.

It being conceded that this iron was the property of the firm up to the day or nearly the day of failure, the question is, whether the acts then done were sufficient to constitute an actual appropriation, so as to transfer the property from the firm to the partner.

The same rules substantially must govern this case, which govern the sale of personal property. In the absence of a fraudulent purpose to affect the rights of third parties — and there is

no room for imputing any such purpose here — we think the evidence shows what would amount to a sale and delivery. It was actually put on board vessels either provided by Mr. Gray, or by his appointment, in pursuance of his order or that of his agent. An agreement for a sale and delivery to a carrier, either a common carrier or a carrier appointed by the purchaser, is a good delivery, and transfers the property. It was shipped on or before the 20th of November, charged on the 20th, and the day of first publication was the 25th. The court are of opinion, that this iron, whilst *in transitu* and on its arrival, was the separate property of Mr. Gray, and as such it was sold with the other property of the Pembroke Iron Works, and the proceeds carried to the credit of his separate estate. The claim therefore to have this credit transferred to the credit of the estate of Horace Gray & Co. was rightly rejected.

The only real question is, when, according to the course of business, did the specific property in the iron pass from Horace Gray & Co. to Horace Gray? It is contended not till arrival at Pembroke. The word “shipped,” in common maritime and mercantile usage, means “placed on board of a vessel for the purchaser or consignee, to be transported at his risk”; and such a delivery is a constructive delivery to the purchaser. It makes no difference that it was to be paid for by the proceeds of the sales at a future time. The charge was on the 20th. The shipment was on or before the 20th. If on that day, it preceded the shipment. “Shipment” means delivery on board. If done on the 20th, the natural inference is that it was in pursuance of arrangements previously made by the engagement of the vessel. “Shipped” implies a past fact, placed, separated, set apart; this is all that was necessary to make it the property of Horace Gray.

There is nothing to show that it was sent at the risk of Horace Gray & Co., or that they paid the freight or insurance. If they did, they charged it in the same account. So that it was not at the risk of the firm from the time of shipment.

Decree affirmed.

WILLIAM THOMAS & others vs. WILLIAM MINOT, Master in
Chancery.

Under *St.* 1838, c. 163, § 21, where a partnership and its members are in insolvency under one commission, and the separate estate of one partner is more than enough to pay his separate debts, the surplus of that estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts, before paying interest on the separate debts.

PETITION in equity, under *St.* 1838, c. 163, § 18, in behalf of all the creditors of Horace Gray and Nathaniel Francis, late copartners in business under the firm of Horace Gray & Co., insolvent debtors, to reverse an order by which the respondent, as a master in chancery, allowed out of Gray's separate estate the whole amount of the claims proved against that estate, with interest to the time of the order. It appeared, by the accounts of the assignees, that there was a balance of assets from Gray's separate estate, more than sufficient to pay all the claims allowed against it, including interest from the day of the first publication of notice to the time of the order; and that the assets of the partnership estate were insufficient to pay the debts allowed against it, without interest. Upon these facts the parties submitted the case to the decision of the court.

E. R. Hoar, for the petitioners. By § 3 of the *St.* of 1838, c. 163, the time of the first publication is fixed as the point of time to which interest is to be computed, and from which interest is to be discounted upon debts not then payable. By § 21, it is provided, that the separate estate shall be appropriated to pay the separate creditors, and the joint estate to pay the joint creditors; and if there shall be any balance of the separate estate of any partner, after payment of his separate debts, such balance shall be added to the joint stock for the payment of the joint creditors. As between creditors, or separate classes of creditors, "debts" means debts provable and proved under the provisions of the insolvent laws.

The provisions of the insolvent laws for distributing the

assets of insolvent debtors between creditors of a partnership and separate creditors, are, to a considerable extent, arbitrary; change, in important particulars, their common law rights; but are adhered to by the courts, without reference to particular cases of hardship. In the case of this very estate, their strict and literal enforcement has operated most injuriously to the partnership creditors, and those creditors are surely entitled to any slight compensating advantage. *Howe v. Lawrence*, 9 Cush. 553. *Somerset Potters Works v. Minot*, 10 Cush. 596, 597.

At common law, the partnership creditor could attach the separate property of the partner, and thus gain a priority over a separate creditor. *Allen v. Wells*, 21 Pick. 450. Under the insolvent law, a partnership creditor may have attached separate property, and thus secured it to the assignees, when his attachment is dissolved by the insolvency. *Purple v. Cooke*, 4 Gray, 120.

There is no provision in the insolvent law, contemplating that the estate shall gain anything by interest, and the assignees have no right to invest it for that purpose. *St.* 1838, c. 163, § 11. There is no provision for interest on preferred debts, or on costs in a suit by which property is held, so as to come to the possession of the assignee. Would those be entitled to interest till the date of distribution? The delay in distribution is the act of the law; it is a necessary incident to the settlement of the estate. *Williams v. American Bank*, 4 Met. 323.

If interest could be allowed to separate creditors after the day of first publication, the question whether an insolvent should receive a discharge, or receive an allowance from his estate, might be affected by a delay over which he had no control. *Sts.* 1844, c. 178, § 4; 1848, c. 304, § 9; 1838, c. 163, § 8. *Baker's case*, 8 Cush. 109.

Interest after breach of contract, or action brought, is in the nature of damages; and there are no damages between different classes of creditors, parties to the same proceeding, to be regarded as arising from the delays necessarily incident to such proceeding. *Barringer v. King*, 5 Gray, 9. As an incident of the debt, at what rate of interest should the interest be cast,

when the debts have been contracted at different rates of interest, under different jurisdictions?

This case is distinguishable from questions arising between all the creditors and the debtor, where the debtor proves to be in fact solvent, and able to pay all his debts with interest; whereas here the question concerns the respective rights of creditors in a particular fund, out of which, whether created by statute or contract, they are not entitled to interest as against each other. *Brown v. Lamb*, 6 Met. 203. *Williams v. American Bank*, 4 Met. 319, 320. *Buffum v. Deane*, 4 Gray, 388, 389.

The English rule in bankruptcy under a similar statute was not to allow interest to separate creditors, out of a surplus from the separate estate, until the joint creditors had been paid their debts as proved. *Ex parte Clarke*, 4 Ves. 677. *Ex parte Reeve*, 9 Ves. 590. St. 6 Geo. 4, c. 16, §§ 62, 132. *Ex parte Minchin*, 2 Glyn & J. 287. *Ex parte Rix*, Mont. 237. *Ex parte Wood*, 2 Mont., Deac. & De Gex, 283. Those decisions are to be followed in construing our statute. *Commonwealth v. Hartnett*, 3 Gray, 450.

S. Bartlett & C. B. Goodrich, for separate creditors of Gray. The basis of the rule established by St. 1838, c. 163, § 21, to apply the separate estate in the first instance to the payment of the separate debts, and the partnership estate to the payment of joint debts, is that each fund is appropriated to the payment of the debts contracted upon the faith of that property. The statute shows that the legislature contemplated the possibility of a surplus as between the two estates. The same equity extends to the payment of the interest as of the principal. It would be unjust to take away the interest from a creditor who has been kept out of his property without any fault of his own.

When interest is a part of the contract, or payable by mercantile usage, it is as much a debt as the principal, and may constitute a part of the original proof. *Eden B. L.* (2d ed.) 134. St. 1838, c. 163, § 3. Unliquidated damages are regarded as a debt in this commonwealth. *Milldam Foundry v. Hovey*, 21 Pick. 417.

The right of the assignees of the joint estate to receive the

surplus of the separate estate, after payment of the separate creditors, is derived through the insolvent debtor, and cannot be greater than his right. No surplus exists until after payment of the separate creditors in full, principal and interest. 1 Cooke B. L. (8th ed.) 513; 514. Eden B. L. 391-393.

It is settled in this commonwealth that "debt" means principal and interest down to the time of distribution. *Brown v Lamb*, 6 Met. 203. It is true that that case arose between creditors and the debtor's personal representatives; but the reasoning of the court rests on the rights of the creditors, and applies as well to this case as to that. "Debt" cannot mean one thing when applied to the debtor, and another thing when applied to creditors. And see 1 Amer. Lead. Cas. (4th ed.) 526, note to *Selleck v. French*.

In *Williams v. American Bank*, 4 Met. 317, there was not enough to pay the debts, and there was no question of joint debts. *Buffum v. Deane*, 4 Gray, 385, turned upon the construction of a peculiar contract.

A creditor who has security by mortgage or pledge is entitled to interest until paid by sale or redemption, although payment may not be made until after the first publication of notice. *St.* 1838, c. 163, § 3. Eden B. L. 135. [SHAW, C. J. The estate is not to have the benefit of the surplus, without paying the pledgee in full.]

The allowance to the debtor is to be paid before the question of surplus can arise. *St.* 1838, c. 163, § 21. The argument founded upon the possible attachment of the separate estate by a partnership creditor goes too far, and would show that the whole principle of marshalling, directed by the statute, was wrong. The application of the petitioners is, in its effect and result, a prayer that the joint creditors may be allowed to prove *pro tanto* in competition with the separate creditors against the separate estate; which cannot be allowed. *Ex parte Reeve*, 9 Ves. 588. *Somerset Pottery Works v. Minot*, 10 Cush. 592.

The English rule in bankruptcy against allowing interest in such cases rests upon an early construction of the bankrupt act, that the whole debt, principal and interest, as of the date of the

commission, was the debt for the payment of which it was intended to provide. By that rule the surplus, if any, went to the bankrupt. The rule itself has been repeatedly disapproved by the courts; and in the cases of most frequent occurrence has been controlled by statute. *Ex parte Boardman*, 1 Cox Ch. 275. *Bromley v. Goodere*, 1 Atk. 78. *Ex parte Champion*, 3 Bro. C. C. 436. *Ex parte Morris*, 1 Ves. Jr. 132. *Ex parte Mills*, 2 Ves. Jr. 300. *Ex parte Clarke*, 4 Ves. 677. *Ex parte Reeve*, 9 Ves. 588. *Lowndes v. Collens*, 17 Ves. 27. *Ex parte Koch*, 1 Ves. & B. 342. *Ex parte Boyd*, 1 Glyn & J. 285. *Ex parte Williams*, 1 Rose, 399. *Ex parte Cocks*, 1 Rose, 317. Eden B. L. 134, 391-394. 1 Deacon on Bankruptcy, (2d ed.) 287, 288, 292-295. St. 6 G. 4, c. 16, §§ 57, 132.

SHAW, C. J.* Distribution is to be made of the assets as they stand at the time of the dividend. The amount of assets which came from the private estate of Horace Gray is to be ascertained for purposes of distribution; and the amount of assets which came from the joint estate of Horace Gray & Co. is to be ascertained, including the interest which has accrued upon it, either by debts due to the estate drawing interest remaining unpaid, or by other increase in value of the assets.

The assets are to be distributed by comparing the separate assets with the debts of the separate creditors as proved; and if the amount is sufficient to pay the whole of the separate debts as proved, the surplus is to be added to the assets of the joint estate and distributed among the joint debts as proved. The same rule would apply if the assets of the joint estate were sufficient to pay the joint debts in full, and there was a deficit in the estate of one of the partners, leaving not enough to pay the separate debts.

As against the debtors, all being liable *in solido* to pay the partnership debts, all the creditors have a right to full payment. The difficulty arises where there is not sufficient to pay the whole.

* This case was argued on the 6th of January 1858, before all the judges except THOMAS and MERRICK, JJ

The relative claims of the classes of creditors are fixed by the liquidation and allowance of the joint and separate debts; and though these allowances are in fact settled afterwards, they all relate back to the day of liquidation, being the day of first publication of notice. The debts are to be paid as they stood then, whether on interest previously or not, whether due at a future day with interest or not; and interest is added or abated so as to ascertain the debts actually due at that time.

In the case before us, the private debts as liquidated and allowed are first to be paid in full out of the separate estate. Then the balance of that estate is to be distributed among the joint creditors. If there is a surplus as against both, then, before paying back that surplus to the debtor, as the creditors have a superior equity against him, that surplus would be applied in the same way; the interest accruing from the separate assets to the payment of the interest of the separate creditors from whose assets it arose; and that from the joint assets to the payment of the interest of the joint creditors. But it is hardly necessary to speculate on such a contingency. It is only alluded to to show the practicableness of the rule we have adopted.

Supposing the statute not to have made any express provision on the subject, or to leave the point in doubt, then we must ascertain the policy of the law, and in expounding the statute or supplying its deficiency we must resort to principle or to analogous cases. *Williams v. American Bank*, 4 Met. 317.

The result is, that the order of the master, in directing a dividend on the estate of Horace Gray & Co., allowing interest to the separate creditors of Gray out of his separate estate, be annulled and reversed; and that the master be directed to order that after the separate debts be paid in full, without interest computed, the balance, if not sufficient to pay the joint debts in full as proved, shall be distributed ratably among the joint creditors of Horace Gray & Co.

Decree accordingly.

ABIGAIL ARMSTRONG vs. URIEL CROCKER & another.

To a bill in equity for an account of sales of a book alleged to have been published by the defendant on the joint account of the plaintiff and himself, an answer which denies that any such book was published during the time alleged, and asserts that the book published by the defendant was a different one, need not render an account of sales.

A bill in equity by the executrix of her deceased husband alleged that the plaintiff was inexperienced and unskilled in the care and management and in the value of property, and that the defendant undertook the general management of her affairs, volunteering his advice to her in all matters of business, and that the plaintiff had full confidence in the defendant and relied upon him to advise and aid her in her transactions, and did not buy or sell or lease property without the aid of his judgment. *Held*, that the answer sufficiently met this allegation by stating that the defendant could only refer to the plaintiff's declaration that her husband was in the habit of communicating to her his business transactions; that, although his property was large, it was such that its value and income, if not fully known, could be exactly ascertained by her upon the slightest inquiry; and that the plaintiff never expressed to the defendant any doubt of her capacity to take charge of all her property and protect all her interests, nor had he any doubt thereof; and which then stated in detail the facts of their intercourse, denying that the defendant ever acted for the plaintiff as an agent or in a confidential capacity. *Held further*, that if the answer alleged that the plaintiff asked of third persons questions relative to her property, it need not state of what persons or concerning what property such questions were asked.

An allegation in a bill in equity, that the plaintiff repeatedly asked the defendant for his bill, is met by an admission in the answer that the plaintiff asked the defendant what she should pay him.

A bill in equity to compel the surrender of a lease alleged that the defendant, before anything was said on the subject by the plaintiff, applied to the plaintiff and solicited of her an extension of the building occupied by him, and a renewal of the lease, and then particularly set forth interviews between them, and that the defendant importuned her to renew the lease, and by these repeated applications and protracted importunities the plaintiff was persuaded to renew the lease on the terms desired. *Held*, that these allegations were sufficiently met in the answer by averring that the plaintiff herself, without any inquiry or allusion to the subject on the defendant's part, inquired if the defendant would so extend the building and take the lease; and by admitting the several interviews set forth in the bill, but averring that they were always conducted pleasantly, and that the defendant always allowed the plaintiff time for consideration; and by wholly denying that any of the pretended grievances, deceptions, fraudulent doings, importunities, persuasions and entreaties alleged in the bill were committed or practised by the defendant, and averring these charges were untrue. But that an allegation in the bill that the plaintiff asked the defendant if he thought the rent agreed upon was a fair one, and that he answered affirmatively, was material and should be directly met in the answer.

BILL IN EQUITY by the widow and executrix of Samuel T. Armstrong against the firm of Crocker & Brewster, book publishers, to compel them to account for the profits of the publication of the books commonly called "Christian Psalmody,"

Armstrong v. Crocker & another.

"Select Hymns and Watts entire," and for the profits of certain lands and stocks, and to compel them to surrender to her the lease of a building on Washington Street in Boston alleged to have been fraudulently obtained from her. The opinion exhibits so much of the case as is material to the understanding of the questions of law decided.

G. M. Browne, for the plaintiff.

H. F. Durant, for the defendants.

MERRICK, J. This case comes before the court upon the report of the master to whom were referred the numerous objections taken by the plaintiff to various alleged insufficiencies of the defendants' answer to the bill. He reports that several of those exceptions ought to be sustained. But it is objected that his decisions in reference to each and all of these particulars are erroneous; and the questions now to be considered and determined arise upon the objection.

1. The master is of opinion that the answer is deficient, in not giving the account of sales demanded in the bill, and therefore to this extent that the plaintiff's exceptions should be sustained. And this he affirms upon the general principle that, although a defendant denies the title of the plaintiff and sets up one in himself, he must answer fully, if he answers at all. Story Eq. Pl. § 845 & *seq.* But this case affords no occasion for the application of that principle. The defendants do not deny the title of the plaintiff, and set one up in themselves, to the books called "Christian Psalmody" and "Select Hymns and Watts entire," but deny the publication or sale of these works during any part of the time in respect to which they are called upon to account; and assert the publication and sale of a distinct work, in which they allege that Armstrong had no interest whatever. They do therefore in effect assert that there were no such sales as those of which an account is demanded. And it is a necessary consequence of this allegation, that no such account exists, and therefore that none such can be rendered. This is explicit, and shows that the answer is not obnoxious to the objection made to it.

2. The master reports that so much of the plaintiff's third

Armstrong v. Crocker & another.

exception as relates to the allegation of her inexperience in business, and of the fiduciary relation of one of the defendants to her, should be sustained, and that the defendants ought in that respect to be required to answer more fully and directly.

The plaintiff's allegation in the bill is that at the time of the decease of her husband she was inexperienced and unskilled in the care and management and in the value of property, and was obliged necessarily to rely on the advice and judgment of some person conversant with business; and that the defendant Crocker, having been in habits of intimacy with her husband and herself, then and afterwards took upon himself the general direction of arrangements in regard to the affairs of the deceased, volunteering his aid, counsel and advice to the plaintiff in all matters of business, and in regard to the ordering and disposition of all her material affairs, and that she had entire confidence in the defendants, and relied upon Crocker especially to advise and aid her in her transactions, and did not buy or sell or lease property without the aid of his judgment.

To the first part of this allegation the defendants' answer that they "can only refer to her own declaration, that her husband was in the habit of communicating to her his business arrangements and transactions;" and they further say that, although the amount of his property was very large, his investments "were such that their value and income, if not fully known by her, could be exactly ascertained by the slightest inquiry; and that until the filing of this bill she never expressed to either of the defendants any doubt of her capacity to take charge, herself alone, of all her property and protect all her interests; nor had they ever any doubt in that behalf."

The answer further alleges that, upon the death of Mr. Armstrong, the defendant Crocker, "having been sent for by the plaintiff, and requested by her to assist her, did offer his services to her freely and fully, as accorded with the intimacy and friendship so long before existing as aforesaid; and at her request undertook the general direction of the funeral arrangements, and also of the arrangements for the settlement of the estate of the deceased in the probate court;" that he collected rents under a

power of attorney from her; and that she "sometimes conversed with the defendant Crocker about her property and affairs, and not unfrequently asked his friendly advice, which he always cheerfully gave her to the best of his judgment, but not as agent or in any confidential capacity."

In stating the actual relations which subsisted between the plaintiff and the defendants, and the aid and assistance afforded to, and the business transacted for her by them, there does not appear to be any substantial omission in responding to all of the material parts of the bill to which the exception applies. Her alleged inexperience in business, and their alleged fiduciary relation to her, are clearly met and substantially denied; and the answer must in this respect be considered sufficient.

3. The eleventh exception asserts that the defendants do not in terms deny that the plaintiff asked Crocker for her bill as she alleges that she had done; and the master is of opinion that this exception should for this reason be sustained. It seems to be quite immaterial whether she did or did not ask him for his bill; but, whether it was so or not, the statement that she did inquire of him what she should pay him, and that he replied that he should be satisfied with whatever sum she should think fit to give, is a sufficient answer to her allegation upon this subject.

4. In reference to the fourteenth exception, the master is of opinion that the defendants' answer that "the plaintiff asked of other persons besides the said Crocker as to the proper annual rent of buildings and stores in the immediate vicinity of her store," but without stating "of whom, or as to what property, she made such inquiries, nor in regard to the rent of what property," is insufficient. The inquiries however, which were made by her, concerned facts which, if they ever occurred, may justly be presumed to be within her own personal knowledge; and therefore when the defendants referred or alluded to these inquiries, as tending to show that she did not rely exclusively, or at all, upon their representations, it was unnecessary that they should particularly specify either the persons of whom, or the property concerning which, the inquiries were made.

5. The twenty-fifth, twenty-sixth and twenty-eighth exceptions are all founded upon the assumption that the plaintiff's allegation, that Crocker, one of the defendants' firm, and before anything was said on the subject on her part, applied to her and solicited of her an extension of the store then occupied by them, and of the leases thereof, is not fully and clearly denied in the answer; and for this reason these exceptions should, in the opinion of the master, be sustained. But this seems to be an inaccurate and unwarrantable conclusion. The defendants assert in their answer that the plaintiff, of her own accord, and "without any inquiry or allusion to the subject on their part, did herself inquire of Crocker if they would so extend the store and take the leases." This is in effect a clear and plain denial of her allegation on the subject, and is therefore all that can be required of them.

6. The bill alleges in substance that the lease of the store to the defendants was obtained by them of the plaintiff by means of the protracted, excessive and unreasonable importunities of Crocker; and it proceeds to state, at great length and in very minute detail, the conversation which took place between him and her at their various interviews which preceded and continued up to the time of the execution of the lease. And she excepts to the answer, on the ground that the various charges specifically and distinctly set forth in the bill are not specifically and distinctly denied in the answer. The master reports that the answer is insufficient, and that this, her thirty-ninth, exception ought to be sustained. All that is really material in the various statements and allegations of the plaintiff consists in her averment and charge, that the lease was obtained of her by excessive and persevering importunity. The answer, admitting that the several interviews referred to took place between the parties, avers that they were always conducted pleasantly, and always allowed the plaintiff time for consideration; and then it wholly denies that all or any of the pretended grievances, deceptions, fraudulent doings, importunities, persuasions, entreaties and appeals alleged in the bill were ever done, committed or practised by Crocker, and avers that all the charges thus made

Cayzer v. Taylor.

are wholly untrue. This is full, direct and explicit, and thus meeting and denying in clear terms the only material allegation on this part of the bill, the answer appears to be subject to no valid objection.

7. The twenty-ninth exception, after referring to the averment in the bill that the plaintiff in one of the interviews between them, which preceded the execution of said lease of said store, asked Crocker, in reference to what was a just and reasonable rent for the store, in direct terms, "Do you think that \$1500 is a just and fair rent?" asserts that the answer nowhere admits, denies or alludes to this specific charge so directly set forth. The master reports that he is of opinion that this exception is well taken and should be sustained. And in this conclusion we think he is correct. This allegation does not appear to have been anywhere, either in direct terms or in substance, met by the answer. And this being a material allegation, and not denied or replied to, the omission of the defendants fully to reply to it affords just cause of exception.

The conclusion from all these considerations, is that the twenty-ninth exception of the plaintiff to the sufficiency of the defendant's answer is sustained, and that all the other exceptions are overruled.

Order accordingly.

WILLIAM CAYZER vs. STEPHEN G. TAYLOR.

In an action by a servant against his master for injuries sustained from the explosion of a steam boiler used in his business, the plaintiff introduced evidence without objection that there was no such fusible safety plug on the boiler, as was required by statute; and the presiding judge excluded evidence of a custom among engineers not to use such a plug; and instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, the plaintiff was entitled to recover; and refused to instruct them that if the defendant used all the appliances for safety, that were ordinarily used in such establishments as his, he was not liable in respect to this boiler, although he did not use the fusible plug. *Held*, that the defendant had no ground of exception.

Ordinary care must be measured by the character and risks and exposures of the business and the degree required is higher where life or limb is endangered, or a large amount of property is involved, than in other cases.

Cayzer v. Taylor.

A master is responsible to his servant for injuries occasioned by the negligence of an incompetent fellow servant, knowingly or negligently employed by the master.

A master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow servant contributes to the accident.

ACTION OF TORT for injuries sustained by scalding from the collapse of a flue in a steam boiler owned and used by the defendant in his manufactory, while the plaintiff was in his employment. The causes of the accident, as alleged in the declaration, were that the defendant negligently managed his engine, and "did not provide a competent and suitable engineer and boiler and engine and pump and gauge and appendages and machinery and precautions for safety used therewith, but carelessly and knowingly provided such as were not competent and suitable and sufficiently safe, and knowingly and carelessly continued the same in use, and improperly used them while out of order and unsafe, either solely or in connection with his servant."

Trial in the superior court of Suffolk at January term 1857, before *Huntington, J.*, who after a verdict for the plaintiff allowed the following bill of exceptions :

" Among the particulars which were alleged by the plaintiff against the sufficiency of the boiler, and to sustain which evidence was offered, was, that it was unprovided with a certain fusible safety plug, referred to in the *St.* of 1852, *c.* 247, and that the defendant used the boiler, knowing it to be so unprovided.

" The defendant, upon this point, offered evidence to show that it was not customary among persons having in use such boilers as the defendant's, and in such establishments as his, to use in connection with them such fusible plugs; and he prayed the court to instruct the jury, that if the defendant's boiler was supplied with all such appurtenances and appliances for safety as such establishments were ordinarily supplied with, he was not liable in respect to his boiler, though in fact he did not have it supplied with the said fusible safety plug in the said statute mentioned. But the court rejected the evidence of a custom violating the requirements of the statute; and instructed the

Cayser v. Taylor.

jury, that if the plaintiff had satisfied them that the defendant knowingly used his boiler without said plug, placed as the law directs, and that the want of it caused the accident, or essentially contributed to it, and that the injury would not have arisen had it been supplied, this might be used as evidence of negligence, and the plaintiff might have a verdict on this ground; and that it might be considered as part of the implied contract between the plaintiff and the defendant that the latter would comply with the law regulating the use of the boiler, so as to give the former a remedy if he sustained injury from the non-compliance with its enactments; but that if he used the boiler without this knowledge, he could not be charged with negligence on this ground, for he had not violated the law.

“Evidence was also introduced on the part of the defendant, tending to show that the accident would not have happened if the engineer had used ordinary care in the management of the boiler and its appurtenances; and to show that the defendant had in all respects used due care. And the defendant prayed the court to instruct the jury, that if they were satisfied that without negligence on the part of the engineer the accident would not have happened, the defendant was not liable.

“The court instructed the jury thus: The plaintiff must show that he himself was in the exercise of due or ordinary care at the time of the accident. This care must be adapted to the nature of the employment and to the hazards attending the business.

“If the plaintiff and engineer were in the same general employment or business, under one employer, it then becomes important to ascertain the legal relation of the parties. We have in the outset the general principle. A person entering into the service of another, in consideration of his compensation, takes upon himself the ordinary risk of the employment in which he engages; and this risk includes the negligent acts of his fellow workmen in the course of the employment. But a fellow workman's being negligent and unskilful on a particular occasion would not give a right of action. The implied contract between a master and servant is, that the master or principal will use such care as a prudent and careful man in the same

business, a business similar in its risks, character and extent, would use, both in the selection and employment of an engineer, and in the selection and use of engine, boiler, flues, pumps, pipes, cocks, gauges, valves and all appurtenances belonging thereto. If the defendant employed an unfit and improper person, or used an unfit engine, boiler, flues, gauges, valves and apparatus, or either of them, and such employment or use arose from want of ordinary care in the employer, and by reason of this want of care the injury was incurred, then the defendant would be responsible.

“ The meaning of the language ‘ordinary care’ was then defined, as distinguished from extraordinary care on the one hand, and negligence on the other. The care must be adapted to the nature of the business and employment. The jury will ascertain from the evidence in the case what at that time were the qualifications of an engineer in such an establishment as the defendant’s was, and with such engine and apparatus. His qualifications are to be measured by the class of engine and the business done. The care used by the master in the selection of servants and machinery, engine and apparatus, is to be measured by the same standard. This standard would be higher in proportion as life or limb was endangered ; and higher where a large amount of property was involved, than a small amount. In other words, the care and prudence must be graduated by the character and risks and exposure of the business.

“ It is contended that the defendant was negligent in the selection of an incompetent engineer, and negligent in continuing him in his employment. There are two inquiries here : 1st. Was the engineer competent or incompetent ? 2d. If he was not, had the master reason to know it ? If he had reason, and if he knowingly, or having good reason to know, and without due care and prudence, employed or continued in his employment such incompetent person, and the accident happened or injury arose by reason of such incompetency, and the plaintiff has satisfied you of this, the burden being on him, he is entitled to recover. If he was not negligent in this respect, or had not reason to know of this incompetency, and the injury did not

Cayzer v. Taylor.

arise from this incompetency, he is not liable on this ground. If it was the careless act of an incompetent engineer, negligently and knowingly employed by the defendant, he would be liable; if it was the careless act of a competent engineer, he would not be liable, so far as this point is concerned.

"It is said the defendant was negligent in suffering his engine, pump, steam gauge, fusible plug, belts and apparatus and appurtenances for safety to get out of order and unsuitable and unsafe. If you are satisfied that he was negligent in this particular, and if the injury arose from this negligence, this would render the defendant responsible. If he was not so negligent, or if the injury did not arise from such cause, the defendant is not responsible.

"It is contended that the defendant was negligent in overloading his engine and boiler and apparatus; in subjecting them to steam power beyond their capacity and line of safety; in fastening down the safety valve and loading the lever with unsafe weights. If the defendant, either by himself or by directions to his servants, carelessly, unskilfully and improperly did any of those acts, and the injury was caused by such negligence or want of skill, he would be liable. If he did not go beyond the line of prudence, skill and care, he would not be liable.

"The jury returned a verdict for the plaintiff, and to the foregoing rulings and instructions the defendant excepts."

C. Browne, for the defendant. The plaintiff counted on the common law liability of the defendant, and not on the *St.* of 1852, *c.* 247. The question for the jury therefore was, whether the use of the fusible safety plug fell within that due and ordinary care which the defendant was bound at common law to exercise. *Bradley v. Boston & Maine Railroad*, 2 Cush. 539. *Linfield v. Old Colony Railroad*, 10 Cush. 568. *Shaw v. Boston & Worcester Railroad*, 8 Gray, 60. Yet the evidence on this point could not have been objected to as incompetent; because the use of the plug might be shown to be necessary to the exercise of ordinary care, independently of any statute. The refusals and instructions of the judge respecting ordinary care were calculated to mislead the jury upon this question.

The degree of care required of railroad corporations does not apply to a business not attended with the same extraordinary privileges and extraordinary risks. And it is well settled that in any employment the negligence of a workman is among the ordinary risks which his fellow workmen take. The doctrine indicated in some English cases (*Wigmore v. Jay*, 5 Exch. 358; *Wiggett v. Fox*, 11 Exch. 832;) that the employer is bound to furnish proper machinery and competent servants, has never been adopted in this country. Nothing has ever been required here beyond ordinary care; and whatever may be the extent of the obligation of the employer to furnish safe and sufficient machinery in the first instance, keeping it in repair afterwards is the duty of the servants, as much as any other part of his business. *Farwell v. Boston & Worcester Railroad*, 4 Met. 62. *King v. Boston & Worcester Railroad*, 9 Cush. 112. *Noyes v. Smith*, 28 Verm. 59. There is nothing here to show that the defendant did not have his boiler provided with a better and more suitable plug than the one mentioned in the statute; and if such was the fact, its being casually and partially disordered so as not to be in condition to avert this accident was not enough to prove the defendant guilty of want of ordinary care in his business.

The judge should have instructed the jury that if the accident would not have happened without negligence on the part of the engineer, the defendant would not be responsible. The principle that the servant in hiring himself to the master is presumed to be willing to run all the ordinary risks of business, and among them that of negligence in his fellow servants, should be liberally applied for the protection of employers. If the machinery was such that, with the exercise of due and ordinary care on the part of the engineer, the accident would not have happened, then the negligence of the engineer was the proximate cause of the accident, and the defendant is not liable. *Hayes v. Western Railroad*, 3 Cush. 272.

C. G. Thomas, for the plaintiff, cited *Brydon v. Stewart*, 2 Macqueen, 30; *Wiggett v. Fox*, 11 Exch 832; *Noyes v. Smith*, 28 Verm. 59

THOMAS, J. 1. The defendant excepts to the admission of evidence that his boiler was not provided with the fusible plug prescribed to be used by the *Sts.* of 1850, c. 277, and 1852, c. 247, and the instructions of the court as to the use of such evidence, when admitted. The obvious, and we think conclusive, answer to this exception is, that the evidence was admitted without objection and without any qualification or limitation, and when thus admitted it was competent evidence upon the question of the defendant's liability, arising under the statute or at common law. The evidence being thus admitted, if the objection had been taken that the declaration was imperfect, an amendment would have been allowed, almost as a matter of course. But the objection was not taken, the exception was not made, and the point is not open.

2. The defendant sought to break the force of the testimony, and offered to show that it was not the custom among persons, using such boilers as his, to have and use such fusible plugs. The court rightly held that a custom not to observe the law could not be shown.

3. The exception to the instructions of the presiding judge as to what was meant by ordinary care cannot be sustained. The instructions were good sense and good law, well expressed. What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers and responsibilities, and then say, What would and should a reasonable and prudent man do in such an exigency? The word "ordinary" has a popular sense, which would greatly relax the rigor of the rule. The law means by "ordinary care" the care reasonable and prudent men use under like circumstances.

4. The next ground of exception, upon which the defendant relies, is the refusal of the presiding judge to instruct the jury that if the accident would not have happened without negligence on the part of the engineer, the defendant was not liable. We think such instruction could not have been given. The de-

fault of the defendant might have been, not only in having a boiler imperfectly constructed and guarded, but an incompetent and habitually careless and negligent engineer. It is now well settled law, that one entering into the service of another takes upon himself the ordinary risks of the employment in which he engages, including the negligent acts of his fellow workmen in the course of the employment. *Farwell v. Boston & Worcester Railroad*, 4 Met. 49. *King v. Boston & Worcester Railroad*, 9 Cush. 112. *Gillshannon v. Stony Brook Railroad*, 10 Cush. 228. It has not been settled that the master is not liable for an injury which results from the employment of an incompetent servant or use of a defective instrument. If the defendant employed a competent engineer, and used a boiler properly constructed and guarded, he would not be liable for injuries resulting from an act of carelessness or negligence of such engineer. But we are not prepared to say that if one uses a dangerous instrumentality without the safeguards which science and experience suggest or the positive rules of law require, he is not to be responsible for an injury resulting from such use, because the negligence of one of his servants may have contributed to the result, or because a possible vigilance of the servant might have prevented the injury. The very object and purpose of a safeguard like the fusible plug are protection against the occasional carelessness and negligence of the engineer. It is intended to be in some degree a substitute for his vigilance — to keep watch if he nods. To say that the master should not be responsible for an injury which would not have happened had a safeguard required by law been used, because the engineer was negligent, would be to say, in substance and effect, that he should not be liable at all for an injury resulting from the failure to use it.

The case of *Hayes v. Western Railroad*, 3 Cush. 270, relied upon by the defendant, proceeds upon the ground that the injury was caused by the negligence of the workman, his failure to be in his place and discharge his duty, and that the train being short of hands was wholly immaterial. Otherwise, it would be difficult to sustain it. See language of the court, p. 274.

The instructions of the presiding judge upon the liability of

Dunlap v. Bartlett.

the master, as affected by the relation of the defendant as fellow servant of the engineer, are not in our judgment liable to just exception. The counsel for the defendant asks of us a liberal application of the principle by which the servant is presumed to assume the risks of the business, and among others the negligence of his fellow servants, for the protection of the master. The principle should not be so extended as to impair in the least degree the obligation resting upon the master, in the prosecution of a business involving unusual risk of health or life or limb, to employ well guarded instruments and competent agents.

*Exceptions overruled.**

ROBERT DUNLAP vs. WILLIAM S. BARTLETT.

Danger of the death of an assaulted person in consequence of the assault is no ground for refusing bail on a charge of assault and battery only.

HABEAS CORPUS of one who had been brought before the police court of the City of Boston on a complaint for an assault and battery upon George Walsh, and committed to await his trial in the municipal court, and who had been refused bail on the ground that Walsh's injuries were so serious as to endanger his life.

J. H. Bradley, for the petitioner.

G. W. Cooley, (County Attorney,) for the Commonwealth.

BY THE COURT. This party not being held for a capital offence, nor it appearing that he ever will be, it is a case for bail. The fact that there is danger that the act may result in a homicide is to be considered by the court in fixing the amount of bail. But not having, as yet appears, committed an offence which is not bailable, he is entitled to bail.

Prisoner admitted to bail.

* See *Bartonshill Coal Co. v. Reid*, 3 Macqueen, 266; *Bartonshill Coal Co. v. McGuire*, 3 Macqueen, 300; *Holmes v. Clarke*, 6 H. & N. 349; *Searle v. Lindsay*, 11 C. B. N. S. 429; *Seaver v. Boston & Maine Railroad*, 14 Gray, 466; *Ryan v. Fowler*, 24 N. Y. 410; *Buzel v. Laconia Manuf. Co.* 48 Maine, 113

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF SUFFOLK AND NANTUCKET,
MARCH TERM 1858, AT BOSTON.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE. HON. CHARLES A. DEWEY, HON. THERON METCALF, HON. GEORGE T. BIGELOW, HON. BENJAMIN F. THOMAS,	}	JUSTICES.
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**OWEN G. PEABODY vs. PRESIDENT AND FELLOWS OF HARVARD
COLLEGE.**

If a trustee having power to sell, but not to mortgage, mortgages the trust estate, the remedy of any one claiming, either in his own right or as trustee, under the *cestui que trust* is at law and not in equity.

BILL IN EQUITY, alleging that by indenture between Jane B. Glover, William H. Montague and John B. Glover, the said Jane, in anticipation of her marriage with said William, conveyed to said John certain real estate, in trust, among other things, that he "shall and may bargain, sell and convey, assign and dispose of all and singular the above granted premises, from time to time, whenever they the said William H. and Jane shall by joint writing under their hands and seals so direct, and the

Peabody v. President and Fellows of Harvard College.

proceeds of such sale or sales invest in such other manner, in personal securities or in real estate, to the same uses and upon the same trusts herein declared of and concerning the above granted premises;" that said Jane and William shortly after intermarried, and John assumed the office of trustee, and at their direction by joint writing under their hands and seals, executed and delivered mortgages of this real estate to the defendants; that those mortgages were unauthorized and void; and that Jane afterwards, under a power of appointment reserved in the marriage settlement, devised said real estate to the plaintiff, to hold in trust for her children, and died. The bill prayed for a decree, instructing the plaintiff in the performance of his duties as trustee, and declaring how and to what extent the mortgages created a lien upon the property, and for further relief.

Answer, that the mortgages were within the power given to the trustee in the clause above set forth, and were made in the execution of the trust in good faith for valuable consideration, and vested a good title in the defendants as against the plaintiffs; and that the plaintiff was not entitled to relief in equity, but had a plain, adequate and complete remedy at law.

This case was argued at November term 1857.

O. G. Peabody, pro se.

E. Merwin, for the defendants.

DEWEY, J.* In the opinion of the court the questions discussed in this case would more properly arise in an action at law. If the views of the plaintiff are sound as to the rights of the respective parties, the plaintiff has a plain, adequate and complete remedy at law, as is alleged in the answer. The estate claimed by the plaintiff is a legal estate, properly the subject of a writ of entry, and this is only the ordinary case of a controverted title to real estate.

The fact that the plaintiff holds the estate as trustee does not change the proper jurisdiction as between him and a third party, claiming by an adverse title inconsistent with and independent of that of the plaintiff. We think the bill should be dismissed

* SHAW, C. J. did not sit in this case.

Fuller v. Ruby.

without prejudice, leaving the plaintiff to pursue his remedy by an action at law, if he elects so to do.

Bill dismissed, without prejudice.

HENRY W. FULLER *vs.* CONRAD RUBY.

In an action to recover rent, the plaintiff counted on a lease to the defendant, an assignment thereof from the lessor to the plaintiff, notified to the defendant, and the defendant's consequent liability to him for use and occupation; and introduced evidence, without objection, that the defendant assented to such assignment, and afterwards attorned and paid rent to him. *Held*, after verdict for the plaintiff, that the defendant could not object to the variance between the declaration and the proof.

A bill of exceptions cannot be sustained unless it states enough of the evidence to show that the judge ruled erroneously and to the prejudice of the party excepting.

Whether the eviction of a tenant by his landlord from part of the demised premises suspends the entire rent, *quære*.

Interruption by a landlord of his tenant's occupation, without evicting him, does not suspend the rent, either in whole or in part.

ACTION OF CONTRACT to recover rent. The declaration alleged that the defendant as lessee made an indenture with Louis N. Tower as lessor, and thereupon entered upon the premises, and had ever since occupied the same; that Tower assigned the indenture to the plaintiff in writing; and that the defendant now owed the plaintiff the sum of \$87.50, "pursuant to said indenture, for the use and occupation of the tenement therein for the six months severally preceding" the 1st of January 1856, "together with interest on the monthly rents so in arrears; said Ruby well knowing of such assignment." Copies of said indenture and assignment were annexed to the declaration.

At the trial in the superior court of Suffolk the following facts were proved: In November 1854 the plaintiff, being seised in fee of the premises, demised them, together with two adjoining tenements, for ten years to Tower, who entered, and in December 1854 underlet the premises by said indenture to the defendant for the monthly rent of \$14.58. The defendant entered, and continued in possession till February 1856, excepting so far as disturbed or evicted as stated below. On the 1st

Fuller v. Ruby.

of June 1855 Tower assigned to the plaintiff, by instrument under seal, his lease to the defendant, and also all his interest in the lease from the plaintiff, subject to said lease to the defendant. The defendant knew of this assignment and assented to it, continued in possession, attorned to the plaintiff, and on the 1st of July 1855 paid him the amount of one month's rent, but had paid none since, although the plaintiff had demanded rent of him monthly.

The defendant contended that if there was a tortious eviction of the defendant by the plaintiff from part of the premises described in the lease declared upon, the entire rent was suspended. The statement in the bill of exceptions of the facts on this point was thus: "There was evidence tending to show that the roof of a shed on the premises had been used for years previously by the tenants for drying clothes, access to which was by stairs and a scuttle door, and that the plaintiff some time in July 1855 told the defendant that he had no right to pass up there for that purpose; that the door was nailed up or locked up, and so continued; and that the defendant told the plaintiff he would pay no more rent, because he cut off that privilege."

Huntington, J. instructed the jury that if the defendant, knowing of the assignment to the plaintiff, paid rent to him under the lease and assignment, admitted that he was the plaintiff's tenant, and continued in possession under the lease, and the plaintiff accepted rent of him as his tenant and treated him as such, it was competent evidence from which the jury might infer that the defendant waived the claim that the rent was merged, and which might rebut the presumption of law as to a merger; and that if the right to use the roof existed previously to July 1855 under the lease, and the plaintiff interrupted that use by stopping it, the defendant continuing in the beneficial occupation of the rest of the estate, it would not, as a rule of law, suspend all claim for rent, but the jury might deduct such sum from the rent reserved by the lease as they thought reasonable. The jury returned a verdict for \$67.00, and the defendant alleged exceptions.

This case was argued at November term 1857.

E. M. Bigelow, for the defendant.

J. A. Loring, for the plaintiff.

METCALF, J. These exceptions do not show that the defendant has any legal reason to complain of the conduct or result of the trial before the jury.

1. It is not necessary to decide whether the ruling as to the alleged merger was correct; because there is a ground on which it is plain that the defendant is answerable to the plaintiff for use and occupation, if not for rent in its technical sense. The declaration is upon an indenture and an assignment thereof to the plaintiff, averring notice to the defendant of that assignment, and alleging, as a legal inference, that the defendant owes the plaintiff a certain sum for use and occupation of the house demised in the indenture. It is immaterial whether this declaration would have been held good or bad on demurrer. For on the trial evidence was given, without objection from the defendant, that he assented to the assignment of the indenture, attorned to the plaintiff, and afterwards paid a month's rent to him, according to the stipulation contained in the indenture. This proved an agreement, beyond the mere legal effect of the indenture and assignment — if they had any legal effect on the defendant — on which the defendant would have been held liable to the plaintiff on a general count for use and occupation. *Gibson v. Kirk*, 1 Ad. & El. N. R. 850. Even in an action of debt for rent reserved in a sealed lease, it never was necessary to declare on the lease. This was an exception to the rule of pleading which required a deed to be declared on, when an action was founded on it. *Warren v. Consett*, 2 Ld Raym. 1503. *Atty v. Parish*, 1 New Rep. 109. *Davis v. Shoemaker*, 1 Rawle, 140. If the defendant's oral agreement to pay rent to the plaintiff, after the assignment of the indenture, was inadmissible under the plaintiff's declaration, it should have been objected to at the trial. The plaintiff might then have had leave to amend. After a trial on the merits, in which a good cause of action for the matter of the suit is proved, and a verdict returned for the plaintiff, the defendant cannot be permitted to object, for the first time, that the action was not in

the right form, or that the declaration was not supported by the evidence. *Jones v. Fales*, 4 Mass. 254. *Brown v. Waterman*, 10 Cush. 117. Were it necessary to the saving of the plaintiff's rights, the court might now permit an amendment of his declaration. Rev. Sts. c. 100, § 22. *Cleaves v. Lord*, 3 Gray, 66. *Stone v. White*, 8 Gray, 589.

2. The other matter of exception is the refusal or omission of the judge to rule that an eviction of the defendant, by the plaintiff, from a part of the demised premises, suspended the entire rent. But the evidence, as stated in the bill of exceptions, showed no eviction of the defendant by the plaintiff; and we can add nothing to it, by presumption or otherwise. A bill of exceptions must set forth so much of the evidence as shows that the judge erred in his ruling as to the law applicable to that evidence; and not only that the judge erred, but that the error was prejudicial to the party who takes the exceptions. There can be no pretence that what the plaintiff told the defendant, or what the defendant told the plaintiff, was any evidence of eviction from the roof of the house. If there had been evidence that the plaintiff nailed or locked up the scuttle, or ordered it to be done, and kept it permanently so nailed or locked up, such act of his might have been admissible evidence, to be submitted to the jury, in proof of eviction. But the exceptions do not state that the plaintiff nailed or locked up the scuttle or ordered it to be done. It "was nailed up or locked up, and so continued." By whom? How long? If by the plaintiff, and permanently, it should have been so stated. The evidence set forth in the exceptions did not raise the question whether an eviction of the defendant by the plaintiff from a part of the demised premises suspended the entire rent or any part thereof; because it showed no such eviction. That question was therefore an abstract one, upon which a judge cannot be rightly called on to make a ruling or give instructions.

It is probable that more evidence was given, tending to prove an eviction of the defendant from the roof of the house, than the exceptions show. For the judge did not treat the question as an abstract one, but made a ruling as on a question properly

before him. And in consequence of that ruling, the jury deducted more than twenty dollars from the plaintiff's claim, when, upon the exceptions, there was no legal reason why he should not have had a verdict for the full stipulated rent. As this was not to the prejudice of the defendant, but for his advantage, he cannot take exception to it.

We avoid the expression of an opinion, whether eviction of a tenant by the landlord from part of the demised premises, suspends the entire rent; because that question is not rightly before us. That such eviction has that effect, by the law of England, we have no doubt. Such is the decided preponderance of authority. *How v. Broom*, Gouldsb. 125. *Upton v. Townend & Greenlees*, 17 C. B. 30, 64. *Christopher v. Austin*, 1 Kernan, 216. In 1814, it was held by Chief Justice Dallas, at *nisi prius*, that the whole rent was not suspended, in such a case, if the tenant continued in possession of the residue of the demised premises, but that he would be liable on a *quantum meruit*. *Stokes v. Cooper*, 3 Campb. 514, note. And this was stated as the law in the treatises, afterwards published, on the law of landlord and tenant, by Claydon, Comyn, Archbold, Smythe and Taylor; in 2 Roscoe on Real Actions, 410; Crabb on Real Property, § 205, and in numerous other books. And the king's bench in Ireland, in the case of *Grand Canal Co. v. Fitzsimons*, 1 Hudson & Brooke, 449, distinctly adjudged this point in the same way, on the authority of *Stokes v. Cooper*. But Mr. Baron Parke, in *Reeve v. Bird*, 1 Cr., M. & R. 36, and 4 Tyrwh 614, questioned the decision of Chief Justice Dallas, and the recent case above cited from 17 C. B. shows that it is not the law of England. We are not apprised of any decision on this point in this commonwealth; though there is a *dictum* of Jackson, J. in *Fitchburg Cotton Manuf. Co. v. Melven*, 15 Mass. 271, that "it is a discharge only in proportion to the value of the land evicted;" and the question was left open in *Shumway v. Collins*, 6 Gray, 227.*

* In *Leishman v. White*, 1 Allen, 489, it was held, that a tenant evicted by his landlord from part of the demised premises was no longer liable, either for rent or for use and occupation.

Mizner v. Munroe.

If the point had been decided here conformably to the case of *Stokes v. Cooper*, and the question had been rightly before the judge at the trial, we could not have sustained his ruling, if the plaintiff had excepted to it, because it was so phrased as to authorize a deduction of rent if the plaintiff interrupted the defendant in the use of the roof of the house by stopping it. An interruption of a tenant, by the landlord, is not necessarily an eviction of him. And nothing less than an eviction will suspend rent, either in whole or in part. On this ruling the jury may have found their verdict on a mere trespass, or temporary disturbance of the defendant, by the plaintiff, for which the remedy was by action, and not by withholding pay for the use and occupation which was enjoyed. 1 Saund. 204, note 2. Com. Land. & Ten. 197. 5 Dane Ab. 310. *Bennet v. Bittle*, 4 Rawle, 339. *Ogilvie v. Hull*, 5 Hill, 52.

Exceptions overruled

THOMAS L. MIZNER vs. GEORGE MUNROE.

Notice to a tenant at will that his landlord has made a lease of the premises to another person need not state that such lease is in writing.

The authority of an attorney by whom a notice to a tenant at will that his landlord has leased the premises to another is signed need not be known to the tenant.

ACTION on the Rev. Sts. c. 104, commenced on the 12th of July 1855, for possession of a dwelling-house in Boston.

At the trial in the superior court of Suffolk at May term 1856, it appeared that Norton Newcomb, the owner of this house, executed and delivered a written lease of it to the plaintiff, dated June 30th 1855, for one year; that the defendant was then tenant at will of the same, paying rent quarterly; and that the following notices, which were both written upon one piece of paper, were duly served on the defendant on the day of their date.

Mizner v. Munroe.

" Boston, June 30, 1855. Mr. George Munroe, Dear Sir, This is to inform you that I have this day leased the premises now occupied by you, number nine Garden Court Street, in Boston, to Thomas L. Mizner. You will please conduct yourself accordingly.

Norton Newcomb,

" by his attorney, M. Dyer, Jr."

" Mr. George Munroe, Dear Sir, You are hereby notified to quit and deliver up to me, within five days, the premises now occupied by you, number nine Garden Court Street, in Boston. You being tenant at sufferance, no further notice will be given. I am particularly desirous of obtaining the peaceable and quiet possession of the premises, if possible; otherwise, I must have recourse to legal measures; the premises having been leased by the owner, Norton Newcomb, to me. Boston, June 30, 1855.

Yrs truly, Thomas L. Mizner,

" by his attorney, M. Dyer, Jr."

It was admitted that Newcomb and Mizner authorized Dyer to give these notices, as the attorney of each, and to sign their names thereto. But there was no evidence that the defendant ever knew or recognized Dyer as their attorney, except from these notices and his conduct at the time of serving them, or had any other notice or information of the written lease, or of a determination of his tenancy. But it was in evidence that at the service of the notices on him, which was done personally, he made no objection to the agency of Dyer, expressed no doubt thereof, nor required any proof or information as to the authority of Dyer to give the notices, and that he then had opportunity so to do.

On this evidence the defendant moved that the plaintiff be nonsuited. But *Nash*, J. refused the motion, and instructed the jury that the notices were sufficient information to the defendant of the determination of his tenancy; and that if the defendant did not object to the form of signature at the time the notices were served on him, and did not question nor require further information or proof of the authority of Dyer, the notices were legal and sufficient. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

Mizner v. Munroe.

G. H. Kingsbury, for the defendant, cited *Furlong v. Leary*, 8 Cush. 409; *Paley on Agency* (3d Amer. ed.) 345; *Right v. Cuthell*, 5 East, 498; *The Queen v. Justices of Worcester*, Will., Woll. & Hodges, 152; *Doe v. Goldwin*, 2 Ad. & El. N. R. 143; *The Queen v. Justices of Surrey*, 5 Ad. & El. N. R. 511.

M. Dyer, Jr., for the plaintiff.

METCALF, J. The written lease for a year, given by Newcomb to the plaintiff, terminated the defendant's tenancy at will, and gave the plaintiff a right to institute and maintain this action, after the defendant had received due notice of that lease. *Furlong v. Leary*, 8 Cush. 409. And we think due notice thereof was received by the defendant. Twelve days before this action was commenced, Newcomb gave him written notice that he had made a lease to the plaintiff, and the plaintiff, at the same time, gave him a like notice. This was more than the law required. A notice from the plaintiff alone would have been sufficient; and that notice need not have been in writing.

The first objection made to the notices which were given to the defendant is, that they did not state that the lease to the plaintiff was in writing. But, as the defendant received notice of a lease, and was thereupon requested to conduct himself accordingly, and quit the house in five days, he must have known that such a lease was meant as had terminated his tenancy at will, made him tenant at sufferance, and authorized the lessee to require him immediately to quit; and that none but a written lease would have this effect. The notices were not of themselves proof of the fact that a lease had been given to the plaintiff, and would not have been proof that it was in writing, if they had so stated. The facts stated in a notice, if not admitted, must be proved in court; and in the present case, the fact was proved that a lease of the house for a year, and in writing, was given by Newcomb, the owner, to the plaintiff. We think the defendant had sufficient notice of the lease, and that he disregarded that notice at his peril.

The other objection made to these notices is, that the defendant did not thereby know that they were signed by the authorized attorney of Newcomb and the plaintiff. But we think the

Twycross v. Fitchburg Railroad Company.

defendant might as well object to the notices on the ground that he did not know that they were not forgeries. The genuineness of the notices, and the authority of the attorney who signed them, were matters to be proved at the trial, if not admitted. *Reade v. Kennedy*, 12 Irish Law R. 565. And the attorney's authority was admitted at the trial.

The decisions cited for the defendant, on this point of the authority of an attorney who signed a notice in the name of his constituent, are not applicable to this case. They all relate, either to some special provision of an English statute, or to notices given to tenants to quit. But the present defendant, being a tenant at sufferance after the lease was made to the plaintiff, was not entitled to notice to quit, but only to notice that his tenancy at will was terminated; and the only question is, whether he had sufficient notice of that fact. We are of opinion that he had. *Exceptions overruled.*



MARTHA TWYXCROSS vs. FITCHBURG RAILROAD COMPANY.

A lessee's covenant "to pay all taxes or duties levied or to be levied" on the premises during the term does not bind him to repay the expenses of paving the sidewalk in front of the premises, required of the lessor by the town under authority of a statute.

ACTION OF CONTRACT to recover the expense of paving the sidewalk in front of land in Charlestown, leased by the plaintiff in 1844 for fifteen years to the defendants, who covenanted in the lease "to pay all taxes and duties levied or to be levied thereon during the said term." In October 1854, the city of Charlestown caused the sidewalk in front of the premises to be paved, pursuant to *St. 1824, c. 16*, the plaintiff having neglected to do so; and the plaintiff paid the expense thereof, and brought this action to recover it, which was submitted to the decision of the court upon the above facts.

H. D. Austin, for the plaintiff, cited *Torrey v. Wallis*, 3 Cush. 442; *In re Mayor &c. of New York*, 11 Johns. 7; *Bleecker v*
25 *

Twycross v. Fitchburg Railroad Company.

Ballou, 3 Wend. 263; *Mayor &c. of New York v. Cashman*, 10 Johns. 93; *Post v. Kearney*, 2 Comst. 394; 1 Story on Const. U. S. § 952.

M. G. Cobb, for the defendants, cited *Goddard, petitioner*, 16 Pick. 504; *Torrey v. Wallis*, 3 Cush. 442; Declaration of Rights, art. 23; Const. Mass. c. 1, § 1, art. 4; Rev. Sts. cc. 7, 8; *Kearney v. Post*, 1 Sandf. 105, and 2 Comst. 394; *Bolling v. Stokes*, 2 Leigh, 178; *Lefevre v. Detroit*, 2 Mich. 586; *Southall v. Leadbetter*, 3 T. R. 458.

THOMAS, J. The question in this case is, whether the amount paid by the plaintiff and lessor to the city of Charlestown for paving the sidewalk in front of the premises demised is included in "the taxes and duties levied or to be levied," which the defendants, the lessees, stipulated to pay.

This sidewalk was paved by the city under the provisions of the St. of 1824, c. 16, entitled "an act to regulate the sidewalks in the town of Charlestown." The provisions of this statute throw much light upon the question to be decided. The first section prescribes the mode in which, in all paved streets in Charlestown, the sidewalks shall be constructed. The second section provides that whenever the town shall direct the paving of any public street, every owner of a lot adjoining shall without delay, at his or her own expense, cause the sidewalk in front of his or her land to be paved with brick or flat stone, and supported by hammered edge stone, and kept in repair, under the direction and to the acceptance of the surveyors of highways; and if the owner shall neglect or refuse to pave and support the sidewalk, after the owner or the tenant of the lot or the attorney of the owner shall have been required to do so, the surveyors are required to pave and support or to repair the same, and may recover the expense by an action on the case in their name. There are further provisions that when the selectmen shall be of opinion that the owner of the lot is unable to comply with the requisitions, the selectmen may direct the sidewalk to be made at the expense of the town; and when there are any vacant lots, the surveyors may at their discretion allow the owner to cover the sidewalk with plank and support it with

Twycross v. Fitchburg Railroad Company.

timber, to be replaced by stone and brick whenever the surveyors shall think it necessary. No lien is created upon the land for the expense of such paving.

These provisions all look to the owner of the land, and to him only. He is the person to construct and to keep in repair. He, under the direction of the surveyors, is to determine of which material, wood or brick or stone, the walk is to be constructed. If the owner is unable, the town is to construct the walk. If he is able, of him the expense is to be collected. The improvement is a permanent one, and the duty of the owner to construct and to repair is permanent. There is no provision for the construction of the sidewalk when the owner is unknown, and for collecting the expense by a lien upon and sale of the land.

In the light of these provisions, and without seeking to determine what possible burdens upon the estate may be included under the terms "taxes and duties," we think it quite clear that the expense of constructing the sidewalk was not a tax or duty levied or to be levied upon the premises demised.

It is true this statute was in existence when this lease was made. But it is also true that in looking at its provisions the tenant might see that they would not affect him, because the statute caused no tax or duty to be levied upon the estate.

The expense of paving the sidewalk is not only not within the letter of the contract, but not within the reason and equity of it. It is a permanent improvement of the estate, the benefit of which is to be found in the increased value of the estate and in the increased rent which it would permanently command.

Plaintiff nonsuit.

Austin v. Harris & another.

DAVID AUSTIN *vs.* THEODORE S. HARRIS & another.

If a lease contains a covenant not to underlet or permit any other person to occupy without the lessor's assent, and that any breach of the lessee's covenants shall terminate his estate therein; an agreement of the lessee to assign the demised premises for the residue of the term is not complied with by an assignment duly executed by him, but not assented to by his lessor.

ACTION OF CONTRACT to recover the amount agreed to be paid for an assignment of a lease from Samuel Sheafe to the plaintiff. Answer, that the plaintiff did not obtain his lessor's assent in writing to the assignment, although the defendant requested him to do so, and offered to pay him said amount if he would. The facts are stated in the opinion.

H. C. Hutchins, for the plaintiff.

J. W. Rollins, for the defendants.

THOMAS, J. This is, we think, a plain case. The plaintiff, for the consideration which he seeks to recover in this action, was to assign to the defendants, on the 1st of February 1856, the lease of the store numbered 219 on Washington Street, and to give up and surrender to the defendants on that day "all that part of the said building occupied by him the said Austin and demised to him by said lease, for the remainder of the term of said lease, to wit, until the first day of March 1856." Here is clearly, if not more, an agreement to give to the defendants the legal possession of the store, and to permit them to use and occupy the premises demised from the 1st of February to the 1st of March.

In the lease under which the plaintiff held the premises he covenanted, among other things, "that he would not lease, nor underlet, nor permit any other person or persons to occupy the same, except with the approbation in writing of the lessor or those having his estate in the premises." It is one of the express conditions of the lease, and the term granted is subject to the condition, that "if any of the covenants to be observed on the part of the lessee or those holding under him shall be broken, the lessor or those having his estate in the premises, whilst such

 People's Mutual Insurance Company v. Allen & another.

neglect or default continues, may without further notice or demand enter upon the premises, or any part thereof in the name of the whole, and repossess the same as of his former estate, and thereby absolutely determine the estate of the lessee therein." The plaintiff had no approbation, written or oral, to assign he lease or to permit the defendants to occupy the premises.

The assignment tendered to the defendants would have transferred to them no use of the premises for the remainder of the term. If it operated even as a permission to the defendants to occupy, it would for that very reason have operated as a determination of the lessor's estate. The defendants had the right to a legal surrender of the premises for the remainder of the term, and not merely to a transfer formal but valueless.

Judgment for the defendants



PEOPLE'S MUTUAL INSURANCE COMPANY vs. OTIS ALLEN & another.

The record of losses kept by a mutual insurance company is sufficient *prima facie* evidence that such losses have occurred, in an action to recover an assessment laid upon the members.

An assessment by a mutual insurance company is valid that is based upon a computation of the losses from month to month, and includes in the losses chargeable upon each policy all those of the entire month in which it expires, excluding those of the month in which it began.

A premium note, payable in such portions and "at such times as the directors may agreeably to their by-laws require," to a mutual insurance company, whose by-laws provide that the deposit note shall be double the premium, and "that on all policies for less than a year the deposit note may be for such a sum as the president may determine;" and which has issued such policies, with a deposit note of one dollar and a premium paid of a larger sum; is not invalidated by a slight disproportion, occasioned by laying an assessment on the deposit notes only, instead of the amount of the premiums and deposit notes.

An assessment by a mutual insurance company is not invalid because it is made to cover losses occasioned by bad investments; nor because it is laid in place of a previous illegal assessment which the directors have not enforced; nor because in consequence thereof it has been delayed for some months.

ACTION OF CONTRACT by a mutual insurance company upon a premium note, made on the 1st of January 1852. in con-

sideration of a policy that day issued by the plaintiffs to the defendants for one year, and by which the defendants promised to pay to the plaintiffs "the sum of two hundred dollars, with interest, in such portions and at such times as the directors may agreeably to their by-laws require," to recover an assessment laid on the 13th of September 1854.

The case was referred to an auditor, and submitted to the decision of the court upon his report in favor of the plaintiffs, as upon an agreed statement of facts.

The plaintiffs' secretary produced before the auditor the "loss book" of the corporation, containing the date of issuing each policy, the amount insured, the date of the loss, and the amount allowed by the directors, when adjusted; and testified that this was the only record of losses kept by the plaintiffs. The defendants objected to its admission, and contended that the plaintiffs must prove that the losses had actually occurred. But the auditor admitted it as *prima facie* evidence of the losses therein recorded.

The other objections argued by the defendant and the material facts are stated in the opinion.

I. W. Beard & J. Nickerson, for the plaintiffs.

B. Dean, for the defendants.

DEWEY, J. 1. The ruling of the auditor as to the competency of the evidence offered to prove that losses by fire had occurred was correct.

2. It furnished no valid objection to the legality of the assessment, that it was based upon a computation of losses from month to month, without regard to the fact that policies expired at various times during each month; nor that the company adopted as the general rule of computing losses chargeable on a policy, to take the months in which the policy terminated, and exclude that in which it commenced; that is, upon a policy commencing at noon January 1st 1852, and expiring at noon January 1st 1853, the company might exclude the losses of January 1852, and include those of January 1853. As one or the other of these months must be necessarily excluded in computing the entire monthly losses, a general rule applicable

to all such cases was not objectionable, though it might exclude some losses for which the party should in strictness be chargeable, and include some for which he would not in strictness be chargeable; such being the necessary result of a computation of entire monthly losses.

3. The objection that the assessment was not made upon the amount of premiums and deposit notes, but on the basis of the deposit notes exclusively, is one of more doubt. Assessments made under the Rev. Sts. c. 37, § 31, are required to be made upon the basis of both premiums and deposits.

The answer to this objection must be found in the fact stated by the auditor, that the difference in the result of the two modes of computation "would be a comparatively unimportant diminution of the assessment on the large notes," and in the by-laws regulating the small class of policies for a time less than a year. It is obvious that as to all other policies, the deposit note being double the premium, the result must be precisely the same, whether assessments were based upon deposit notes or deposits and premiums, if it were uniformly applied to all cases. The only cases in which any practical difference results are those of a small number of policies issued under the provisions of the sixth article of the by-laws, providing that "on all policies for less than a year the deposit note may be for such a sum as the president may determine." Under this provision, certain policies were issued, the assured giving his deposit note for one dollar, while the premium paid was a larger sum. The precise reason for this mode of adjusting the amount of deposit notes, as compared with the premium paid, does not appear. These policies are understood to have been for short periods, and to have required a greater cash premium to be paid, which was directly applicable to the uses of the company, than the ordinary policies of the company. This note by its terms was to be paid "in such portions and at such times as the directors may agreeably to their by-laws require." It was competent for the party giving the deposit note to subject himself to a liability greater than that imposed by the revised statutes. It might be entirely reasonable that a party, who had paid as a

cash premium for a short risk a sum much larger than the average rate of premium, should be exonerated from giving a deposit note in double the amount of premium paid, or that such premium should be the basis of an assessment.

The fourteenth article of the by-laws authorizes the president and directors to "assess on each member, in case losses should require it, a sum in addition, not exceeding the amount paid by him as premium and deposit note, and collect the same without delay." This is a different provision from that of the Rev. Sts. c. 37, § 31, as to the amount of the liability to be assessed, and also as to the provision of that section, requiring the assessment to be made "upon the members in proportion to the amount of their premiums and deposits severally for seven years."

Upon the facts existing in the present case, the court are of opinion that this assessment is not rendered invalid by reason of the manner of its being ordered by the directors to be assessed, making the notes of the assured the basis, and deducting from the amount so assessed against any policy the cash deposited to the credit thereof.

4. It is no ground for any objection to the assessment, that the company had made a loan of \$2000, without adequate security from the borrower, whereby the same was lost. The assessment was in fact ordered by the directors for the payment of expenses and losses for which the company were liable. They might be in the greater necessity for money by reason of losses by bad investments of their cash funds, but this should not deprive them of the power to make the necessary calls upon their members to discharge their liabilities and expenses.

5. Nor does it invalidate this assessment, that there had been a previous assessment laid by the directors to meet some of these losses and a small number of the members had paid that assessment; the directors having subsequently become satisfied that such assessment was illegally laid, and having provided, in the new assessment, that those who had paid the previous one should be credited with it on the new assessment.

6. The delay in making this assessment was not, under the circumstances shown in the case, such as to defeat it, if it

embraced no losses accruing after the month of January 1853. We are aware that such assessments under the provisions of the revised statutes, and for the benefit of those who seek payment for losses under their policies, are required to be made forthwith, or upon failure so to do a liability may attach to the directors personally. But this has not been considered as affecting the assessment, if not literally complied with. It would seem somewhat remarkable if it were otherwise held, and it might thus be the means of defeating the very purpose for which the deposit notes are required to be taken. Such delay may properly arise from various causes. That which would most frequently occur would be a case of controverted liability for a loss by fire. It might be a subject of protracted litigation, when of course no assessment would be made until the liability was fixed. It might be, as in the present case, that the delay as to the assessment for the earlier losses embraced in the arrears assessed arose from the fact that an earlier assessment had failed to be effectual by some irregularity in making it, not known to be such at the time it was made. In the opinion of the court, the delay in the present case does not vitiate the assessment. *Marblehead Insurance Company v. Underwood*, 3 Gray, 213.

7. As to the various other points suggested in the brief of the defendants, but not argued, we perceive none that can avail the defendants.

Giving full effect to the finding of the auditor as to matters properly passed upon by him, in the opinion of the court

Judgment should be rendered for the plaintiffs.

LICA PARKER & another vs. BRIDGEPORT INSURANCE COMPANY.

In a policy of insurance upon a saw-mill, the assured covenanted "that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void." The applicant, to a question "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered, "A good watch kept; men usually at work. Watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?" In fact, no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to and habitually did examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises. *Held*, that the term "good watch" must be interpreted to mean "suitable" or "proper watch"; and that it was for the jury to decide whether the watch kept was a suitable and proper one, and whether the risk was affected by the watch actually kept, as compared with the one stipulated for.

ACTION OF CONTRACT on a policy of insurance upon machinery and stock in a saw-mill at Winchester, in which the insured covenanted "that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to them and material to the risk; and that if any material fact or circumstances shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void."

The application contained printed interrogatories and answers written opposite them, which stated that the mill was driven by water power only, and among which were the following:

"2. What kind of goods are made and of what material? Mahogany sawing and knobs turned. Very few shavings made. Cleared out every night." Are wood-shavings made on the premises? and if so, are they cleared out of the building every night?"

<p>"16. Is a watch kept upon the premises during the night? Is there a good watch clock? Is any other duty required of the watchman than watching for the safety of the premises? Is the building left alone at any time after the watchman goes off duty in the morning, till he returns to his charge in the evening?"</p>	<p>"A good watch kept. Men usually at work. "Watchmen work at the saws." "No."</p>
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At the trial in the superior court of Suffolk at November term 1856, it was in evidence that "there was no watch ever kept in the mill on Saturday night after twelve o'clock, or on Sunday night at all, after the date of the application to the time of the fire, other than the workmen sleeping there, who worked at the saws, and who were instructed to examine, and were in the habit of examining, the mill with reference to fires before going to bed; that the fire by which the property insured was destroyed occurred on Sunday evening about ten o'clock, and that when the fire occurred neither of the persons who usually slept in the building was upon the premises, but they were in a dwelling-house near by."

Abbott, J. ruled "that it was the duty of the plaintiffs to have a person in the mill, whose employment it was to keep a good watch in the building, during the whole of Saturday and Sunday nights, although in addition to the duty of watching, he might be employed about other work; and the keeping such workmen to sleep there, though with a view to greater security than would exist if there was no one there, was not a good watch or substantial performance of said duty; that a failure to substantially perform said duty would bar a recovery; and that evidence of the usage in other like mills not to keep such a watch on Sunday nights and on Saturday nights after twelve o'clock was not admissible to affect the case in this respect;" and also ruled, "*pro forma*, in order to carry up the point, that it was the duty of the plaintiffs to keep some person upon the

Parker & another v. Bridgeport Insurance Company.

premises during the whole of the daytime of Sunday, and that a customary absence of all persons during the hours of divine service, would be a breach of duty which would bar a recovery." A verdict was taken for the defendants, and the plaintiffs alleged exceptions.

C. P. Judd, for the plaintiffs, cited *Crocker v. Peoples' Mutual Fire Ins. Co.* 8 Cush. 79; *Jones Manuf. Co. v. Manufacturers' Mutual Fire Ins. Co.* 8 Cush. 84; *Underhill v. Agawam Mutual Fire Ins. Co.* 6 Cush. 440; *Houghton v. Manufacturers' Mutual Fire Ins. Co.* 8 Met. 114; *New York Firemen Ins. Co. v. Walden*, 12 Johns. 513; *Ruggles v. General Interest Ins. Co.* 4 Mason, 81; *Curry v. Commonwealth Ins. Co.* 10 Pick. 540; *Dorr v. Fenno*, 12 Pick. 529; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 82; *Percival v. Maine Ins. Co.* 33 Maine, 249.

B. Sanford, for the defendants, cited *Houghton v. Manufacturers' Mutual Fire Ins. Co.* 8 Met. 114; *Glendale Woollen Co. v. Protection Ins. Co.* 21 Conn. 19; *Sheldon v. Hartford Fire Ins. Co.* 22 Conn. 235.

SHAW, C. J. Although the condition or defeasance upon which the defendants rely is put into the form of an express stipulation on the part of the assured, inserted in the policy, and declaring that, in case of a misrepresentation in a matter known to the assured and material to the risk, it shall be void; this is little, if anything, more than the law itself would declare, in case of such false representation proved.

The alleged false representation is contained in the answer to the sixteenth question in the application. It is difficult to determine what is meant by the first part of that answer. One inquiry is not answered at all—that respecting the watch-clock. The inquiry was, "Is a watch kept upon the premises during the night?" The answer certainly fell short of answering affirmatively to the whole question, that is, that a watchman is kept there during the whole night, or during every night. And it does not aver that any watchman is engaged, distinct from workmen. There being nothing but the term "good" applied, "a good watch," our opinion is, that it is equivalent to "suitable," "proper," adapted to the exigency of the

case. The inquiry is not as to watchman, or watchmen; the more generic term "watch" embracing the various modes of watching such a factory. It was a factory the machinery of which was driven by water; no steam was used; it was not a manufactory of metals, or one that required the use of fire.

Upon an examination of the bill of exceptions, it appears to us, that there were several points ruled positively as matter of law, which should have been left to the jury; and this on several grounds.

In the first place, if there was not an absolute stipulation that a watch should be kept during the whole of every night in the week, such a watch as would be necessary and proper to the safety of such an establishment against fire, then it was a question of fact whether the watch actually kept was or not a good and suitable watch. *Crocker v. Peoples' Mutual Fire Ins. Co.* 8 Cush. 79.

If there is a real difference between the requirement of a watch, immediately after a working day, and Sunday, which is a day of rest, then a watch might be deemed good and adequate on Sunday night, which might not be after a working day. The causes of danger of fire in a factory, we suppose, are lamps and stoves, after work is done; friction, arising from the great velocity and irregular action of working machinery; spontaneous combustion; incendiaries; and lightning. The last, of course, no watch would affect; the three first, perhaps the greatest, would be likely to disclose themselves within a few hours after the close of work, and therefore would seem to exist in a less degree on Sunday night. If there was ground to except Saturday night, when the workmen, charged as watchmen, examined the premises after the close of business, having an interest in the safety of a building in which they slept; or if there was ground to except Sunday night, after a day in which no work had been done; then it was incorrect to charge the jury, that it was the duty of the assured to have a person to keep a good watch in the building during the whole of Saturday and Sunday nights, otherwise they could not recover.

But suppose the sixteenth question and answer, by their proper

Hammond v. American Mutual Life Insurance Company.

construction, could be held to be a representation that the plaintiffs had been accustomed to keep, and would in future keep, a watch on the premises every night during the week, including Sunday and Saturday, still the stipulation that this was a just and true exposition is not absolute, but only *sub modo*; the contract is, that is, so far as they are known to the assured, and are material to risk. The question therefore is, not only whether the assured was substantially to comply with his stipulation that the representation is true and just, but whether such compliance was material to the risk. This is a question of fact, to be decided by the evidence.

The insurer may prescribe any conditions to his undertaking, that he pleases, and if he makes insurance on condition that a constant watch shall be kept on the premises, otherwise the policy shall cease and be void, then if the assured fails to comply with the conditions, his policy is to cease, and no question can be made whether compliance affected the risk in any way. But when such condition is qualified by the limitation, that it is a failure dependent on the question whether it is material to the risk, it opens that question in each particular case.

Exceptions sustained

MARY R. HAMMOND vs. AMERICAN MUTUAL LIFE INSURANCE COMPANY.

Under a policy of life insurance, to "terminate in case the premium charged shall not be paid in advance on or before the day at noon on which the same shall become due and payable," if the day of payment falls on Sunday, the premium is not payable until Monday, even if the assured dies on Sunday afternoon.

ACTION OF CONTRACT upon a policy of insurance, insuring the life of John Hammond, in consideration of a premium "to be paid annually in advance, during the term of this policy, or half or quarter yearly in advance, with interest on each portion deferred;" and payable to the plaintiff "within ninety days after

Hammond v. American Mutual Life Insurance Company.

proof of the death of the said John Hammond, provided this policy is then in force." The policy upon its face declared that "in case the premium charged hereon shall not be paid annually in advance, or half or quarter yearly in advance, on or before the day, at noon, on which the same shall become due and payable," it should "cease and terminate, and neither the whole nor any part of the sum herein agreed to be paid shall be due or payable;" and that the policy was "granted and accepted in reference to all the conditions herein contained," and others annexed. The "conditions of insurance" annexed to the policy, provided that "policies are null and void during the nonpayment of any premium due; but the company will, at their discretion, receive a payment after due, and continue the policy, if satisfied that the party remains in perfect health."

Upon the back of the policy were these words: "Premiums payable 1st January; or 1st January and 1st July; or 1st January, 1st April, 1st July and 1st October, at noon."

The parties submitted the case to the decision of the court upon the policy and the following facts: John Hammond paid the premiums quarter yearly, as provided by the policy, and was taken sick on the 24th of September, and afterwards confined to his house, but not thought to be past recovery until the morning of Sunday, October 1st 1854, and on that day, between the hours of two and four in the afternoon, died, without having paid the premium for the quarter which began on that day. The defendants' office was not open on Sunday, and no one was there to receive the premium, but this was not known to the plaintiff, and no attempt was made to pay it until Monday, October 2d, in the forenoon, when it was tendered and refused. The death of the assured was notified by the plaintiff to the defendants on the 18th of December 1854.

L. Mason, for the plaintiff, cited *Stebbins v. Leowolf*, 3 Cush. 137; *Thayer v. Felt*, 4 Pick. 356; *Avery v. Stewart*, 2 Conn. 69; *Sands v. Lyon*, 18 Conn. 18; *Delamater v. Miller*, 1 Cow. 75; *Salter v. Burt*, 20 Wend. 205; *Link v. Clemmens*, 7 Blackf. 479; *Barrett v. Allen*, 10 Ohio, 426; 1 Kent Com. (6th ed.) 131; Rev. Sta. c. 50, § 1; *Buckbee v. United States Insurance, Annuity*

& Trust Co. 18 Barb. 541; *Hammond v. American Mutual Life Ins. Co.* 20 Law Reporter, 273.

H. A. Scudder, for the defendants. This policy may be regarded as an insurance from quarter to quarter, so long as the premium thereon was paid "quarteryearly in advance," and therefore as having expired on the 1st of October 1854 at noon, before the death of the assured. *Turlton v. Staniforth*, 5 T. R. 695. *Want v. Blunt*, 12 East, 183. *Mutual Benefit Life Ins Co. v. Ruse*, 8 Georgia, 534.

If not, then it must be construed as a conditional agreement of the defendants to pay the sum named "within ninety days after proof of the death of the" assured, "provided this policy is then in force." And

(1.) The conditions of the policy had not been complied with on the part of the assured at the time of his death. The premium was not paid or tendered "in advance," or "on or before the day at noon on which it became due," or "during the term of the policy," that is, the life of the assured; and the assured died after the premium "became due," and "during the non-payment" thereof. Consequently the policy was not then "in force," but had become by its own terms "null and void." Cases above cited. *Vose v. Eagle Life Ins. Co.* 6 Cush. 42. *Hathaway v. Trenton Mutual Life Ins. Co.* 11 Cush. 448.

(2.) The tender subsequently made on Monday cannot operate *nunc pro tunc* as a compliance with the conditions of the policy. If available at all, it must be upon the ground that when the day of performance of contracts falls on Sunday, compliance with the stipulations of the contract on the next day is deemed in law a performance. *Salter v. Burt*, 20 Wend. 205. But that rule only applies to one class of contracts, and even there seems of questionable authority. *Avery v. Stewart*, 2 Conn. 69. *Kilgour v. Miles*, 6 Gill & Johns. 268.

No such rule can apply to this case. The assured being dead, there was no person in existence legally authorized to tender a compliance with the requirements of such a rule, and no contract of the assured to which such rule could be applied. The assured never contracted to pay the successive premiums.

Compliance with the terms of the policy in this respect was entirely optional on his part. The act to be performed by him was in the nature of a condition precedent, and as such must be strictly construed, and the defendants' liability made to depend upon previous compliance with that condition.

No necessity existed for an application of the rule, as the premium might have been paid before as well as on the day it became due. And to allow its application would be to enable the assured, by his own negligence, to cast upon the defendants the burden and risk of insuring his life for an additional day without any adequate consideration; inasmuch as the payment of the premium at the expiration of such additional day would be left to depend upon the will, or at least upon the ability, of the assured, in violation of the express terms and conditions of the policy.

DEWEY, J. There can be no doubt as to the character of this contract, and that the policy would be forfeited and avoided by the neglect of the assured to pay the premium chargeable thereon at any quarter day when the same became due and payable. The policy was granted by the one party and accepted by the other with a recital therein that the same was to be taken "in reference to all the conditions herein contained." Among those conditions it is provided that "in case the premium charged hereon shall not be paid annually in advance, or half or quarter yearly in advance, on or before the day, at noon, on which the same shall become due and payable," then the same shall "cease and terminate, and neither the whole nor any part of the sum agreed to be paid shall be due or payable."

The whole inquiry is reduced to this point, when was the quarter yearly payment for the quarter succeeding that commencing on the 1st of July 1854 due, and by law required to be paid? Adopting the proper division of the year into four quarters, and commencing on the 1st of April 1854, the third quarter would commence on the 1st of October, and the premium to be paid for that quarter, irrespectively of the circumstance that the first day of October occurred on Sunday, would be required to be paid on that day. The assured had however until the 1st of

Hammond v. American Mutual Life Insurance Company.

October at noon to pay the premium. He was not in default before that time, unless it be that in case the 1st of October occurring on Sunday, he was required to pay the premium on the Saturday preceding. The only question in the case seems to be whether Sunday is to be excluded as a day of payment, and the payment properly postponed till Monday, or whether the party, to save his policy from being forfeited, must make his quarterly payment on or before Saturday, when the quarter day falls on Sunday.

We have on the one hand the rule as to commercial paper, or negotiable notes payable with grace, requiring payment to be made on Saturday where the third day of grace falls on Sunday; and on the other a rule, generally adopted as to other contracts to pay money or perform other specific duties on a certain day named, that if such day falls on Sunday the day of performance is postponed till Monday. *Salter v. Burt*, 20 Wend. 205.

In reference to notes payable on a certain day, but entitled to three days' grace, it is said that in such case the note by its terms would be due and payable two days earlier than Saturday, and that what was originally a mere indulgence to casualty or oversight should not be extended, and therefore if the last of three days of grace falls on Sunday, the payment must be made on Saturday, and that it was more reasonable to take from than to add to a period of time thus originally allowed as mere grace and favor. But as to other contracts, which by the face of the instrument required a payment on a day which proves to be Sunday, to discharge literally the promise or duty, the law seems to sanction the postponement of the time for doing the same till the Monday following. In other words, Sunday is not a legal day for the performance of contracts and doing secular business. The statute law forbids all such acts. The party paying and the party receiving money on that day in discharge of a contract would subject themselves to a penalty for so doing. Sunday was not a day contemplated by the parties as embraced in the stipulation to pay a quarterly premium on the first day of October in each and every year during the life of the party assured. The defendants had no office open

Hammond v. American Mutual Life Insurance Company.

on that day, and were under no obligation to receive the payment of the premium on that day, if the same had been tendered by the assured. Such being the case, the assured was under no obligation to do what would have been not only an illegal act, but also one which the other party was not bound to recognize. In this view of the case there was no such default on the part of the assured, in not paying the premium fully due on the 1st of October, as should be held to terminate the policy.

It is urged on the part of the defendants that this was not an ordinary contract to be performed on a day certain, and that the assured was under no legal obligation to pay subsequent premiums after the expiration of a quarter of a year; but such payment was a voluntary act, to be done or not done at his election; and therefore that the rule of law applied to a contract binding a party to do some act at some future named period, which proved to be Sunday, has no proper application here. But we think the rule as to the time of making the payment is the same in both cases. It was the purpose of the assured to obtain a policy to continue during his life. Such policy was issued to him, but upon condition that he should make his quarter yearly payments regularly in advance. It was obligatory on him to pay, if he would continue the policy in force. The day of payment was on this occasion the first day of October. That day, as it appears, fell on Sunday; and this being so, he was entitled to the ordinary privilege of discharging his obligation on the Monday following. The quarter yearly payment, it is true, in terms became payable on Sunday noon; but that day was not a day for secular business, and therefore, legally speaking, Sunday was not the day "at which the same became payable;" and so, by the very provisions of the policy, properly construed, the quarterly premium was seasonably tendered on Monday.

Judgment for the plaintiff.

**JEREMY PERKINS vs. AUGUSTA INSURANCE AND BANKING
COMPANY.**

A vessel was insured "at and from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port (European) between Tarragona and Gibraltar, and at and thence to New York." Four months after, this memorandum was indorsed on the policy: "Permission is given to stop at one other port between Tarragona and Gibraltar, paying one fourth additional premium if liberty is used." *Held*, that this gave permission to stop between Tarragona and Gibraltar upon the homeward voyage from Tarragona, but not to stop at Gibraltar also.

A policy of insurance on a vessel is not avoided by her going out of her course to obtain necessary medical assistance for the captain's wife; and the question of the necessity is for the jury.

Taking on board water and additional cargo, at a port into which a vessel has gone to obtain necessary medical assistance, does not avoid a policy of insurance on the vessel, unless it increases the delay or the risk.

A letter of abandonment of a vessel upon the ground that, in consequence of sea perils, "being found irreparable on survey, she was condemned and sold," sufficiently states the cause of abandonment, if the vessel was so much damaged that the costs of repair would exceed half her value, deducting one third new for old.

The certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of the seaworthiness of a vessel at that time, if supported by his oath that he examined the vessel, and that he has no doubt that the facts stated in it are true, although he has no independent recollection of those facts.

A question "whether, if the foremast was sprung, the try-sail split and standing rigging such as to need replacing at" a certain port, "the master would probably have known it?" does not depend on nautical skill, and cannot be put to an expert.

ACTION OF CONTRACT on a policy of insurance, dated April 9th 1851, upon the Brig Josephine, "at and from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port (European) between Tarragona and Gibraltar, and at and thence to New York." On the 18th of August 1851 this memorandum was indorsed on the policy: "Permission is given to stop at one other port between Tarragona and Gibraltar, paying one fourth additional premium if liberty is used." Answer, deviation and unseaworthiness. Trial at November term 1851 before *Bigelow, J.*, who made the following report thereof:

"It appeared that the vessel left Tarragona on her return voyage on the 22d of July 1851, with a part of her cargo on board; on the 28th of July put into Almeria and took in a considerable quantity of cargo, remaining there till August 11th; and on the 16th of August was abreast of the port of Gibraltar.

"The captain testified that his wife, who was on board with the knowledge and consent of the owners, came upon deck to look at the Rock, and on turning to go down the cabin stairs missed her footing, and fell from the top to the bottom, a distance of about six feet; that she was at that time in the third month of her pregnancy; that under the circumstances he felt himself called upon to stop at Gibraltar for medical advice and aid; that he accordingly came to anchor and sent a boat on shore for a physician; that the physician prescribed for her, and under his advice and direction the vessel remained at Gibraltar until August 22d; that while there some new cargo was taken on board; that the vessel left Gibraltar as soon as his wife was well enough; and that the logbook was kept by the mate, and he believed it to be correct."

The entries in the logbook from August 16th to August 22d made no mention of the accident to the captain's wife, but corresponded with his testimony in other respects.

"On her voyage home, the vessel met with a disaster and was abandoned to the underwriters.

"These facts presenting a question of law as to whether the policy was made void by an unjustifiable deviation, the jury were directed by the presiding judge to find a verdict for the defendants, which is to stand confirmed or be set aside, and a new trial ordered, as the judgment of the whole court may be upon the above point of law."

This question was argued and decided at November term 1855.

G. S. Hillard, for the plaintiff.

R. Choate & J. M. Bell, for the defendants. 1. The policy either calls for a straight voyage from Tarragona to Boston, touching nowhere, looking to the use of the two ports, to touch at which permission is given, between Tarragona and Gibraltar on the outward voyage; or, if the permission to use the two ports allows their use on the return voyage, it calls for a straight voyage from the last port visited in accordance with the permission to Boston. Neither of these constructions gives liberty to touch at Gibraltar.

2. The sickness of the captain's wife was no excuse for the

deviation at Gibraltar. Sickness of the crew even, unless so great as to leave the ship with too small a force to work her, is no excuse. 1 Arnould on Ins. § 152. *Woolf v. Claggett*, 3 Esp. R. 257. The captain's wife had no right, as against the defendants, to be there; and in this respect the vessel was, as it were, not properly fit for the voyage; and going out of the course to procure aid for her was like putting into port for medicine and medical aid which ought to have been on board, or on account of sickness of crew, when the vessel was insufficiently manned in the first instance. The case does not find that her life was in danger; and even the deviations to save life, which have been excused, have been to pick up men from other vessels. 1 Arnould on Ins. § 152. 1 Phil. Ins. § 1027. The log-book shows that the ship did not put into Gibraltar for the sickness of the captain's wife, but to take in water and wait for cargo.

MERRICK, J. The brig having stopped on her passage back from Tarragona to the United States, first at Almeria and afterwards at Gibraltar, the defendants insist that there was a deviation in each of these instances by which the underwriters were discharged from all responsibility on account of subsequent losses. This is denied on the other hand by the plaintiff, who contends that the privilege of entering and using each of those ports on the homeward voyage was secured to him, first by a clause relating to that subject contained in the policy, and again by the terms of the memorandum indorsed upon it on the 18th of August. But neither of these conflicting propositions is fully warranted as a consequence of any express stipulation or agreement between the parties. The insurance of the brig by the defendants was upon a voyage, as it is described in the policy, "from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port between Tarragona and Gibraltar, and at and thence to New York." But by a later arrangement between the parties the further permission was given to the insured "to stop at one other port between Tarragona and Gibraltar." Considering the manner in which that permission is expressed, and the time when it was given, it was obviously the concession of a privilege to be availed of on

the homeward voyage. This is indicated by the order in which the two places constituting the external limits of the space within which it was to be enjoyed are mentioned, and is a reasonable implication from that circumstance. And as Tarragona, which is the extreme point and termination of the outward voyage, is first named, and is therefore to be passed before this right can be exercised, it is a necessary consequence that it must be exercised on the passage of the brig to its homeward port. And that this was the intention of the parties is apparent from a consideration of the time when their agreement was made. The memorandum was indorsed on the policy more than four months after its date, when they could have entertained no reasonable doubt that the whole outward voyage had been accomplished, and that the brig was either then lying at Tarragona, or had already departed thence on her passage back to New York. It is to this part of the voyage therefore that the permission in the memorandum indorsed on the policy is, according to the intention of the parties, to be applied; and it gave the assured the right, of which he availed himself, to put into the port of Almeria. But he had no such right to stop as he afterwards did at Gibraltar. It was not included in the liberty secured to him in the description of the voyage in the policy, nor in the additional privileges which were conceded to him by the indorsement of the memorandum upon it. That place is mentioned in the former clause as one of the points to be touched at, and then to be departed from for Tarragona; and in the latter, as one of the external limits or boundaries of the space within which the liberty of using another port may be availed of. Neither of them recognizes it as a port to be revisited, or to which the brig, after once having left it, might again resort.

But the plaintiff contends that, independently of the rights of the parties, as they are fixed and established under and by virtue of the particular provisions contained in the policy and the memorandum indorsed upon it, the accident which befell the wife of the captain, and the necessity of resorting, in consequence of it, to medical advice and assistance for her relief, constituted a sufficient and legal justification for the putting

Perkins v. Augusta Insurance and Banking Company.

in and detention of the brig at the port of Gibraltar. The broad and comprehensive proposition that delay or going out of the course for the purpose of succoring the distressed is said by Mr. Phillips to have been invariably held to be no deviation. And he adds, that if this principle, though always mentioned by elementary writers as an admitted and established doctrine of maritime law, is not often recognized by the courts, it is because a justification resulting so directly from the plainest principles of humanity, and in the sufficiency of which the assured and insurers are usually so much interested, has never been directly called in question. 1 Phil. Ins. § 1027.

It is true that the authorities to which he refers in support and illustration of this general proposition are cases where the object of the departure from the course was to carry relief to mariners or passengers destitute and suffering on board other vessels. But the principle is not confined to such cases. It has a wider and more general application. Its validity was recognized by the court in the case of *Kettell v. Wiggin*, 13 Mass. 68. There the vessel insured went out of her course from the Isle of May to St. Jago and Fuego and back to the Isle of May; and it was contended that this voyage was necessary and constituted no deviation, because there was a scarcity of provisions and water, and the crew might otherwise have suffered from a want of them. And Chief Justice Parker, in delivering the opinion of the court, said, that if the destitution was not occasioned by the negligence of the master, the excuse was sufficient and justified the departure from the course. It makes no difference whether the object of such departure is to alleviate the distress and administer to the necessities of persons who are lawfully on board, or of strangers suffering from disasters sustained by the loss or wreck of another vessel. The dictates of humanity are as forcible in the one case as in the other; and it would be strange and unreasonable if the law recognized any discrimination between them.

To make the excuse valid and effectual, it must without doubt be shown that there was a real necessity for the departure of the vessel from her proper course. The exigency which demands

relief must be equal in importance to the intervention which is required in its behalf. Whether it exists, and what it is, must always be questions of fact. To determine rightly all the circumstances of infirmity and suffering and of relief afforded on the one hand, must be considered in connection with the increased length of the voyage, the prolonged time required to accomplish it, and the additional risk incurred, on the other. Mr. Arnould lays down the rule, that only actual force and constraint, either moral or physical, will constitute a justification. But from the explanation which he afterwards adds, it appears that the requisite kind and degree of force may be considered as being applied, where the state of circumstances is such, that the master, exercising a sound judgment, and acting for the best interests of all concerned, has no alternative left, as a prudent and reasonable man, but to take his vessel out of its course. 1 Arnould on Ins. § 152. The rule, thus qualified, neither excludes a consideration of the claims of humanity, nor fails to afford a reasonable degree of protection to the pecuniary interest of parties who have insured the safety of the ship. But if there is a conflict between the two, the former must, to the extent above stated, be regarded as of paramount importance.

The testimony of the captain upon the trial of the present action tended, we do not think it necessary now to express any opinion how strongly, to show the existence of an exigency which justified the departure of the vessel under his charge from the regular and onward course of the voyage, and its detention for the time it was delayed in the port of Gibraltar. But the presiding judge, considering that the facts disclosed in that testimony presented a question of law, which should be determined by the court before further progress was made in the cause, the fact whether such exigency existed was not tried nor submitted to the jury. In the view which we have taken of the whole subject presented in the report, we are of opinion that the former verdict which was taken for the defendants should be set aside and the case placed in order for trial. The question of fact whether there was a deviation will then be submitted to the determination of a jury, under proper instructions from the

Perkins v. Augusta Insurance and Banking Company.

court, conforming to the principles which have been already stated and explained. And if it shall then be made to appear that the brig was taken into the port of Gibraltar and detained there solely for the purpose of affording succor to the distressed upon a fit and proper occasion, the defence relied on cannot be maintained.

It was testified by the captain, and it is also reported in the logbook, that while the brig was lying in the port of Gibraltar certain bales of merchandise were taken on board as part of her cargo. And the defendants insist that the mere fact of taking cargo on board while she was lying in a port when there was no previous agreement or stipulation that the vessel should go in or remain for that purpose, did of itself necessarily constitute a deviation. But this position is untenable. If a ship, under the terms of a policy, or for any sufficient legal cause, is justified in originally entering into the port, her subsequent trading, by breaking bulk, loading or unloading, during the period of her lawful stay and detention there, although such trading, loading and unloading are foreign to the main purpose of the adventure, and not specifically provided for by the terms of the policy, will not be held to amount to a deviation. 1 Arnould on Ins. §§ 143 & seq. *Lapham v. Atlas Ins. Co.* 24 Pick. 1. *Chase v. Eagle Ins. Co.* 5 Pick. 51. But it would be otherwise if those operations caused additional delay, or otherwise substantially enhanced or varied the risk. Of these matters the jury will judge upon the evidence submitted to them.

New trial granted.

At the second trial at March term 1856, before the chief justice, the defendants waived all objection to the plaintiff's recovery on the ground of deviation; and it appeared that the vessel, after leaving Gibraltar to proceed on her voyage to the United States, and when about four days out, encountered a gale of wind, upon the character and force of which, its action upon the sea, and the combined action of the wind and sea on the vessel, much conflicting evidence was given; and that, the vessel leaking so badly that many of the officers and crew considered it

unsafe to proceed, the captain concluded to put back, intending to return to Gibraltar; but after two days, the wind proving unfavorable to go to Gibraltar, put away for Cadiz, and reached that port, having been out from Gibraltar about eight days; that at Cadiz surveyors appointed by the American consul, at the request of the master, estimated the necessary repairs at over \$6000, and expressed an opinion that the cost of a complete repair there would amount to more than the vessel would be worth when repaired; whereupon the master sold the vessel and appurtenances.

After the arrival of intelligence that the vessel had put into Cadiz in distress, the plaintiff signed and addressed to the defendants the following letter:

"Boston, November 5th 1851. Messrs. Page & Banks, Agents Augusta Insurance and Banking Co. Gentlemen, I am sorry to learn by the public prints that the brig Josephine has been compelled to put into Cadiz in distress, in consequence of sea peril encountered on her passage from the Mediterranean for New York; and that, being found irreparable on survey, she was condemned and sold. In consequence of this information I am compelled to abandon said vessel to your company, so far as she was covered by policy No. . And I now give you notice of a claim for a total loss. Whenever the documents come to hand, I shall submit them to you."

1. The chief justice, as he stated in his report of the trial, "instructed the jury, as above stated, not that the plaintiff would recover for a total loss without an abandonment, in consequence of the sale, but that if the vessel had suffered so much damage by a peril insured against, that the costs of repair would exceed half her value, deducting one third new for old, this was a constructive total loss, which, if followed seasonably by a valid abandonment, would warrant them in finding for a total loss. It was not objected that the abandonment was not seasonable, but that it did not sufficiently and truly state the cause. The letter of abandonment was produced; and supposing that the construction of it was matter of law, the chief justice was of opinion that the words 'found irreparable

Perkins v. Augusta Insurance and Banking Company.

therein, did not mean physically incapable of being repaired at any cost ; but incapable of being repaired, without expense after deducting one third, which would exceed one half of her value, as specified in the valuation ; and if that was the case, it was sufficiently stated in the letter, to make it a valid abandonment."

2. The plaintiff, in order to prove the seaworthiness of the vessel when she sailed from New York, offered the deposition taken at New York in 1854, and the certificate annexed to one of the answers, of Samuel Candler, who testified as follows :

"I am a marine surveyor, and have been so since the year 1843. I was a shipmaster about forty years, and commanded a great many vessels, before I was appointed surveyor by the chamber of commerce and board of underwriters in this city. The business of a marine surveyor is to survey hatches and stowage of cargoes, and to appraise, arbitrate and judge of vessels and goods arriving damaged or becoming damaged in the port of New York. Besides my business as surveyor, I have been for ten or eleven years inspector of vessels for Lloyds, London. My duty as inspector is to inspect vessels for the purpose of giving them their rate and character. I have no doubt that on an average I have inspected three vessels every working day during the last ten years. In inspecting a vessel for rating, we ascertain where she was built, how old is she, what timber she is built of, and her condition generally in hull, rigging and spars. This is inspection for rating. In inspection for repairs, we direct our attention to the particular damage to the vessel said to require repairs, and not so much to the other parts of the vessel.

"I examined a brig named Josephine. I do not remember when. I should think two or three years ago. I do not remember the name of the captain. She was lying in the port of New York. I do not remember at whose request or to what extent.

"I have examined the paper annexed to the commission."

* United States of America.

Port of New York.

The undersigned, Samuel Candler, marine surveyor, and inspector for the un

The writing of that paper is in my handwriting, and the signature is mine. The statements therein contained were true at the date thereof, so far as I know or remember.

"A 2 means 'second rate' here and at Lloyd's. It means a vessel that has deteriorated from a higher rate by wear, or a vessel that is not perfectly constructed either as respects style or materials, or that has been crooked or strained or worked so as not to be perfectly tight. An A 2 vessel is considered just as safe, and will insure in this city, and I believe at Lloyd's, as low as an A 1 vessel, but she is not so valuable.

"I do not remember whether I saw the Josephine out of water or unladen; and I do not know of any means of refreshing my memory except from the certificate annexed to the commission. That certificate is taken from the surveyor's books, and they would not contain any more particulars, unless the vessel was under repair, when they would state in addition what repairs had been needed and what were made.

"I do not remember the fact of the examination at all. In the usual course of my business I cannot rate a vessel without examining her sufficiently to judge of her seaworthiness. But in this case I have no recollection of the fact."

The chief justice "was of opinion that the certificate of the inspector, issued in the course of his business, and verified by his oath, was competent evidence."

3. Captain Alden Gifford, called by the defendants, testified that he was formerly a shipmaster, and now a marine surveyor and inspector of vessels in Boston. This question was put

derwriters at Lloyd's, does hereby certify and make known unto all to whom these presents shall come or may concern, that at the request of the parties interested, I have taken a strict and careful survey of the brig Josephine, Rogers master, of 232 $\frac{1}{2}$ tons measurement, built of the best materials at Scituate, Massachusetts, in 1833, copperfastened and coppered, tight, strong and substantial, calculated to wear well, a good easy model, fit to carry dry and perishable cargoes; rates A 2, and is worthy of full confidence.

In testimony whereof I have hereunto subscribed my name this 2d day of April in the year of our Lord one thousand eight hundred and fifty one.

Samuel Candler.

Perkins v. Augusta Insurance and Banking Company.

to him : " Whether if the foremast was sprung, the trysail split, and standing rigging such as to need replacing at Gibraltar, the master would probably have known it ? " It was objected to, as a question not depending on nautical skill. Thereupon the chief justice ruled that it was a question not apparently depending on nautical skill of the witness, and not admissible.

The jury returned a verdict for the plaintiff for a total loss, and the defendants excepted to the rulings above stated.

These exceptions were argued at November term 1857.

Choate & Bell, for the defendants. 1. The abandonment was insufficient. The cause stated in the letter was that the vessel was irreparable ; this was not true in fact ; for she could have been repaired, though at a cost which would have exceeded half her value, deducting one third new for old. 2 *Arnould on Ins.* §§ 366, 379, 385, 403. 2 *Phil. Ins.* §§ 1681, 1684. *Peirce v. Ocean Ins. Co.* 18 Pick. 93. *Dickey v. New York Ins. Co.* 4 Cow. 222. Upon the plaintiff's construction, if she could be repaired at a trifle over that arbitrary amount, she would be irreparable in America, reparable in England.

The construction of this letter, being a mercantile instrument, was for the jury. *Carpenter v. Providence Washington Ins. Co.* 16 Pet. 495. *Etting v. Bank of United States*, 11 Wheat. 76. 2 *Parsons on Con.* 5.

2. The certificate of Candler was improperly admitted. The general rule is, that the least degree of evidence admissible is the recollection of the witness upon his oath. This paper does not come within any of the established exceptions. It is not introduced to prove a single act, such as the execution of a deed, or the posting of a notice, or the protest of a note ; but is an extended and detailed narrative. Nor is it like a book of account, kept in the ordinary course of business, open to many eyes, and full of numerous particulars. The limit of proving matters done in the ordinary course of business is to show that there was no neglect of official duty. There was no necessity for the examination of the ship ; if there had been, it could easily have been remembered. Even entries in a log book are not evidence, unless the person who kept it will swear that on

his present recollection he believes them to be true ; and in fact he does in every case remember some facts. But this witness does not even remember that he was ever in the ship. Nor does he swear that he made the certificate at the time of the examination. No paper is admissible which is not the first which was made. 1 Greenl. Ev. § 437. *Merrill v. Ithaca & Owego Railroad*, 16 Wend. 596. *Doe v. Perkins*, 3 T. R. 749. *Alvord v. Collin*, 20 Pick. 430, 431. *Bunker v. Shed*, 8 Met. 152, 153. *Chamberlain v. Carter*, 19 Pick. 188.

3. The question put to Gifford concerned what would be visible to an eye sharpened by experience, and required nautical skill to answer.

Hillard, for the plaintiff.

BIGELOW, J. 1. The abandonment was sufficient. It gave notice to the insurers, that the cause of the loss was a sea peril, encountered on the passage of the vessel from one port to another, by which she was rendered irreparable. It would be giving too strict a construction to a document, to the validity of which no precise form or technical words are necessary, to hold that the word "irreparable" signified that the vessel was absolutely incapable of receiving repairs. Construed, as it ought to be, with reference to the mutual rights and liabilities of the parties under a contract of insurance, the more reasonable and natural inference from the language was, that the vessel had sustained damage by a peril insured against to an amount sufficient to absolve the insured from the necessity and duty of making repairs upon her, and to justify a claim for a total loss. If she was injured so that the cost of repairs, after deducting one third new for old, would exceed half her value as stated in the policy, it was not incumbent on the plaintiff to repair her. In this sense, she was irreparable by him, because such repairs would be inconsistent with his claim against the defendants for a total loss.

2. The certificate made by the marine inspector at New York as to the condition and seaworthiness of the vessel in the year 1851 was competent evidence. It was not a mere private memorandum, made for the purpose of enabling a witness to refresh

Perkins v. Augusta Insurance and Banking Company.

his memory, and recall and testify to the facts therein stated. But it was a certificate made by a person of skill and experience, engaged in the regular and constant performance of a particular duty or service, well known and recognized among merchants and shipowners, and sanctioned by the usage and customs of business.

Nor was it the record of a past transaction merely, or of existing facts casually noticed, to which no importance was attached at the time. On the contrary, it was a statement of facts contemporaneous with the written memorandum, made for the purpose of giving information to parties interested in the subject matter to which it related, and which was acted on by them. It was therefore in its nature a semi-official document, and although not made in pursuance of any positive enactment or rule of law, it was nevertheless, like the entries made by bank clerks, messengers and other similar agents, competent evidence of the fact therein stated. It seems to us to come within the rule laid down and fully illustrated and explained in *Shove v. Wiley*, 18 Pick. 558.

Nor can it be fairly said that the certificate is not supported by the oath of the witness. Although he has no independent and distinct recollection of the facts therein stated, yet in connection with the certificate, and the usual course of his business, he does testify to the truth of the statement. *Smith v. Johns*, 3 Gray, 517. *Crittenden v. Rogers*, 8 Gray, 452.

3. The question put to the expert was inadmissible, because it asked that which did not require any special skill or experience to answer. No person competent to sit on a jury would need to be told whether a master of a vessel would "probably know that his foremast was sprung, his trysail split, and his standing rigging in such condition as to need replacing."

Judgment on the verdict.

LYMAN KINSLEY vs. LEWIS RICE & others.

The holder of a policy of insurance, made by a stock company when under liability for losses to an amount equal to their capital stock, cannot maintain an action on the Rev. Sta. c. 37, § 18, against the directors for a loss under his policy, without first recovering a judgment against the company, fixing the amount of the loss.

THOMAS, J. This action seeks to charge the defendants as directors of the Metropolitan Insurance Company for a loss by fire under a policy of insurance issued by that company. It seeks to charge them by force of the provisions of the Rev. Sta. c. 37, § 18. That section provides that if "any of the said companies [stock companies] shall be under liability for losses to an amount equal to their capital stock, and the president or directors, after knowing the same, shall make any new or further insurance, the estates of all who shall make such insurance or assent thereto shall be jointly and severally liable for the amount of any loss which shall take place under such insurance." The declaration contains a count in tort and one in contract, both setting forth facts which (assumed to be true, as they must be in this hearing) would render the defendants liable.

To both counts the defendants have demurred, and on two grounds; first, that the declaration does not allege that the plaintiff has established his claim against the insurance company by a suit and judgment at law or otherwise; and secondly, that the defendants are not liable under the statute to a personal action at law.

The question raised by the demurrer is not as to the ultimate liability of the defendants, but whether the suit can be maintained in this form. We think it cannot; that the loss as against the company must be ascertained and determined before the plaintiff can proceed against the defendants as directors making the insurance; that it is upon and for a loss ascertained and determined that the defendants are to be charged, if at all.

Though the words of the statute would seem, at first view, to warrant an action at law against the defendants, as the par-

ties originally liable under the contract for the loss, the difficulties attending such construction are insuperable. Such has been the conclusion of this court in the interpretation of other statutes creating like liabilities of the officers or stockholders of corporations. *Harris v. First Parish in Dorchester*, 23 Pick. 112. *Knowlton v. Ackley*, 8 Cush. 93. *Merchants' Bank v. Stevenson*, ante, 235, and cases cited.

1. The determination of the loss must necessarily precede the question of the liability of the defendants as directors for such loss. The first is a question between the insured and the company. The contract of insurance is with the corporation. The corporation is the party primarily liable. It is the party by whom the question of loss must be tried. A judgment in this suit would not conclude the company, which is not a party to the record, and has no day in court. On the other hand, no one of the defendants nor all could contest the liability of the company as against its own default or admission. *Holyoke Bank v. Goodman Paper Manuf. Co.* 9 Cush. 576.

2. If the question whether there was a loss or not within the policy could be settled in a suit against the directors, so far as the defendants in the suit were concerned, and so as to charge them, then, as the liability of the president and directors is several as well as joint, the question of the loss might have to be tried as many times as there were president and directors whom the plaintiff might seek to charge. The results of the different suits as to the loss under the policy might conflict; in one case for the insured, in another for the underwriters; and if in all cases for the insured, the estimates of the loss by different juries might widely differ.

3. The result of a construction of the statutes, by which the question of the loss should be tried in the suits against the directors or any of them, would be to defeat and deprive any director sued and charged of the benefits of those provisions of the statutes, which give him a remedy for contribution against any other director or directors for his or their due proportion by bill in equity or action at law against the corporation for the money paid by him; for neither the corporation nor the other

Wills v. Prichard.

directors could be concluded by judgment as to the loss, in a suit to which they were not parties and in which they had no power to intervene. Rev. Sts. c. 37, § 35.

The regular course of procedure is for the insured to ascertain and fix the amount of his loss by judgment against the company; and then, if there are any of the directors who are liable for the judgment under the provisions of the statutes, a bill in equity or action of contract may be brought against such directors or any of them, setting forth the claim against the corporation and the grounds on which the insured expects to charge the defendants personally. Rev. Sts. c. 37, § 34.

For the purposes of this case, it is sufficient to say this action cannot be maintained, because it does not appear that the plaintiff has established his claim for loss against the company.

Demurrer sustained.

E. Merwin, for the defendants.

C. T. Russell, for the plaintiff.

CHARLES WILLS vs. AUGUSTUS P. PRICHARD.

The assent of three fourths in value of the creditors of an insolvent debtor, which is requisite to his second discharge under *St. 1844, c. 178, § 5*, must be filed within six months of the date of the assignment.

ACTION OF CONTRACT upon a promissory note. Answer, a certificate of discharge in insolvency. Replication, that the defendant had once before taken the benefit of the insolvent law; and that upon the second insolvency his estate did not pay fifty per cent. of the claims proved against it, and three fourths in value of his creditors did not, within six months of the assignment, assent to his discharge.

At the trial in the superior court of Suffolk at May term 1856, *Nash, J.* ruled "that the fact that the assent of three fourths in value of his creditors was not given and filed within six months after the assignment, if proved, would not invalidate

Wills v. Prichard.

the discharge ; that it was sufficient if given and filed before the discharge was granted ; this being a case of a second insolvency by the defendant under the statute." A verdict was taken for the defendant, and the plaintiff alleged exceptions.

H. C. Hutchins, for the plaintiff, cited *St. 1844, c. 178, §§ 4, 5, 9* ; *Buck v. Sayles*, 9 Met. 459 ; *Gates v. Campbell*, 8 Cush. 104 ; *Revere v. Newell*, 4 Cush. 584 ; *Beverly Bank v. Wilkinson*, 2 Gray, 519 ; *Merriam v. Richards*, 3 Gray, 252 ; *Williams v. Robinson*, 4 Cush. 529 ; *Sanderson v. Taylor*, 1 Cush. 87.

C. Robinson, Jr., for the defendant. By *St. 1844, c. 178, § 4*, a debtor whose estate pays less than fifty per cent. on all claims proved against it is entitled to a certificate of discharge "unless a majority in value of his creditors who shall have proved their claims shall dissent therefrom within six months after the date of the assignment." By § 5 a debtor insolvent for a second time, and whose estate pays less than fifty per cent., is not to be discharged "unless three fourths in value of the creditors whose claims are proved shall assent thereto in writing." The omission in § 5 of the limitation of six months, inserted in § 4, shows that a debtor who is obliged to obtain the assent of a larger proportion of his creditors is not to be limited to that time. At most, this limitation applies only to obtaining the assent of a majority of the creditors, not of three fourths. The *St. of 1848, c. 304, § 9*, is a substitute for § 4 only of *St. 1844, c. 178. Gates v. Campbell*, 8 Cush. 106. *Dwarris on Sts.* (2d ed.) 604.

THOMAS, J. The point raised by the bill of exceptions is the validity of the defendant's discharge in insolvency. The defendant was insolvent for a second time and his estate failed to pay fifty per cent. of the debts and claims proved. He could not therefore obtain his discharge, or if obtained it would not be valid, unless three fourths in value of the creditors whose claims were proved should assent thereto in writing. *St. 1844, c. 178, § 5*. The question in issue between the parties is when such assent may be filed ; whether it must be filed within six months after the date of the assignment.

Though the fifth section of the *St. of 1844, c. 178*, does not,

 Brigham & another v. Coburn.

considered separately, in terms impose this limitation, yet from the provisions of the fourth and fifth sections taken together, as *in pari materia*, we think such limitation is the fair conclusion. Upon any other construction, there would be no limit to the time of filing such assent. This we understand to have been the construction heretofore given to the statute, though the precise point involved in the case at bar was not raised. In *Gates v. Campbell*, 8 Cush. 104, it was held, that the creditors whose assent would authorize the discharge must be creditors whose claims were proved within six months after the date of the assignment. The reason given for the restriction is that the statutes set six months as the time within which the assent is to be given and the discharge acted upon. 8 Cush. 108.

A new trial must be had, but the parties will observe that the conclusion which the court has reached seems to dispose of the cause.

Exceptions sustained.



WILLIAM BRIGHAM & another vs. DANIEL J. COBURN.

A writ sued out by an assignee of the estate of an insolvent debtor need not aver that he is such under the insolvent laws of the Commonwealth.

The affidavit of a party to a suit, that he has made diligent search for a deed of assignment to him under the insolvent laws, and that it has been lost or mislaid, and is not to his knowledge recorded, is sufficient to allow the introduction of secondary evidence of its contents.

The testimony of the clerk of a commissioner of insolvency, that he drew the assignment of the estate of an insolvent debtor, and kept no copy of it; but that the blank form of a copy produced by him was the same used by the commissioner, and that he has filled it up from minutes on his docket, and believes it to be a correct copy of the assignment, is sufficient to verify the copy.

ACTION OF TORT for the conversion of a gold watch. The plaintiffs described themselves in the writ as "assignees of Stephen G. Bass, an insolvent debtor."

The answer denied all the plaintiffs' allegations; and also contained a demurrer to the declaration, for the reason "that it did not state that the plaintiffs were the assignees of said Bass

Brigham & another v. Coburn.

under the insolvent law of 1838 and the statutes in amendment thereto, or otherwise."

In the superior court of Suffolk at March term 1856, *Nelson*, C. J. overruled the demurrer, and ordered the trial to proceed, and the further proceedings were stated in the bill of exceptions thus :

"The plaintiffs filed an affidavit of one of the plaintiffs, that he had made diligent search for a deed of assignment, and that it was lost or mislaid, and that it was not, to his knowledge, recorded in the registry of deeds. The defendant objected that this affidavit was not sufficient to enable the plaintiffs to prove the contents of said deed by secondary evidence. But the presiding judge overruled the objection.

"The plaintiffs then called the clerk of Francis Hilliard, Esq., commissioner of insolvency, who testified that he drew the assignment in the case of said Bass ; that he kept no copy of said assignment. He then produced a copy of a deed of assignment, and testified that the blank form in which it was made was the same used by Mr. Hilliard, and that the witness had, since the commencement of the trial of this case, filled it up from certain minutes on the docket kept by him of the proceedings in the case of said Bass, and that he believed it to be a correct copy of said assignment. The plaintiffs then offered to put this alleged copy into the case. This was objected to by the defendant. But the objection was overruled by the presiding judge."

The jury returned a verdict for the plaintiffs, and the defendant appealed from the judgment upon his demurrer, and excepted to the other rulings.

J. G. King, for the defendant.

W. Brigham, for the plaintiffs.

METCALF, J. The demurrer in this case was rightly overruled by the superior court. The only cause assigned for it is the omission of the plaintiffs to describe themselves as assignees under the insolvent laws. They describe themselves as "assignees of Stephen G. Bass, an insolvent debtor." But no assignee of a debtor's property can maintain an action, as

assignee, unless he has been appointed under the insolvent laws, and has received an assignment of the debtor's property, under those laws. Nor can any administrator maintain an action, as administrator, unless he has been appointed by the right judge of probate, and has given bond to perform his trust. *Langdon v. Potter*, 11 Mass. 314. *Davis v. Davis*, 2 Cush. 113. Yet he does not and need not aver, in a declaration, that he was appointed by the rightful authority, or has qualified himself by giving bond. 11 Mass. 314. By describing himself as administrator, he is understood to describe himself as a lawfully authorized and qualified administrator, without an averment that he is such. And if his authority is not admitted, he must prove it, or fail in his suit. So, as it seems to us, when an assignee of an insolvent debtor sues as such, it is to be understood, without his so averring, that he is assignee under the insolvent laws, (by which alone he is enabled to sue,) and has received, from the commissioner or judge of insolvency, an assignment of the debtor's property; and that it is sufficient for the maintenance of the action, if he prove his qualifications, when they are not admitted. See 7 B. & C. 406.

In strict legal accuracy, the plaintiffs should have termed themselves assignees, not of Bass, but of his estate; as an administrator should term himself administrator, not of the deceased intestate, but of his estate. Whether, if this too common inaccuracy had been specially pointed out as a demurrable defect in the declaration, the demurrer ought to have been sustained, we have not inquired. As it was not thus pointed out, we must disregard it. *Sl. 1852, c. 312, § 21.*

The first ground of exception taken to the proceedings at the trial is the admission of secondary evidence of the deed of assignment to the plaintiffs, upon the affidavit of one of them as to the loss of that deed.

The law requires, as preliminary to the reception of secondary evidence of a document, only such proof as induces a legal presumption of the loss of that document. And this question of legal presumption must often be addressed to the discretion of the judge before whom the trial is had. 1 Greenl. Ev. § 558.

Brigham & another v. Coburn.

The affidavit in this case has not been exhibited to us ; and we cannot perceive, from the general statement of its contents, as set forth in the exceptions, that it did not raise a reasonable and legal presumption of the loss of the deed, according to the established rules of evidence. The question, what is due inquiry for a deed or other document, in order to admit secondary evidence of it, must be decided upon the particular circumstances of the case in which that question arises. *Miller v. Miller*, 1 Hodges, 187. 2 Phil. Ev. (N. Y. ed. 1849,) 229, 230. "In ordinary cases," says Mr. Baron Alderson, "you do not make search as for stolen goods. The court must be reasonably satisfied that due diligence has been used ; it is not necessary to negative every possibility — it is enough to negative every reasonable probability — of anything being kept back." *McGahey v. Alston*, 2 M. & W. 214. Upon the circumstances of the case before us, we cannot decide that secondary evidence was wrongly admitted. The case of *Page v. Page*, 15 Pick. 374, shows that the affidavit of the other assignee and plaintiff was not indispensable to the admission of such evidence.

The next exception is to the competency and sufficiency of the secondary evidence which was admitted. But we think it was both competent and sufficient. The effect of that evidence was, that a deed of assignment of Bass's property was made to the plaintiffs, by the commissioner of insolvency, in the form of that which the witness exhibited as a copy. The correctness of that form has not been questioned by the defendant.

Demurrer and exceptions overruled.

New England Steam and Gas Pipe Company v. Parker & another.

NEW ENGLAND STEAM AND GAS PIPE COMPANY *vs.* WILLIAM
B. PARKER & another.

It is no defence to a bond to dissolve an attachment, that within thirty days after judgment in the original action the principal took the benefit of the insolvent laws.

ACTION OF CONTRACT on a bond made by Hubbard Blakesley as principal, and the defendants as sureties, to dissolve an attachment on mesne process. The case was submitted to the decision of the court upon the following statement of facts:

The due execution and delivery of the bond are admitted. In the action in which it was given, the plaintiffs recovered judgment on the 26th of March 1856, upon which execution issued the day following. That judgment is wholly unsatisfied. On the 7th of April 1856 a warrant in insolvency was issued against Blakesley upon his own petition, the first publication of notice of which was on the 8th of April. If these proceedings in insolvency are a good defence to this action, judgment is to be entered for the defendant; otherwise, for the plaintiff.

B. Dean, for the plaintiff.

M. G. Cobb, for the defendants, cited *St.* 1838, c. 163, § 7; *Loring v. Eager*, 8 Cush. 188; *Murray v. Shearer*, 7 Cush. 333; *Sampson v. Clark*, 2 Cush. 173.

METCALF, J. The plaintiffs are entitled to judgment on this statement of facts. The condition of the bond, which the defendants executed as sureties, has been broken. Judgment was recovered against the principal before he applied for a discharge under the insolvent laws, and neither he nor the defendants paid the amount of the judgment within thirty days after it was rendered. The discharge of the principal from that judgment, and from his obligation on his bond, does not discharge the defendants from their obligation. It is provided by *St.* 1838, c. 163, § 7, that no discharge of any debtor, under that statute, shall release or discharge any person who may be liable for the same debt as a surety for the debtor. Judgment

Putnam v. Cushing.

must therefore be entered for the penalty of the bond, and the defendants will be heard in chancery as to the sum for which execution shall issue. If the plaintiffs have proved their judgment against the principal before the commissioner of insolvency, the defendants may probably have the amount of the dividend, which is decreed thereon, deducted from the sum for which they would otherwise be liable. This, however, and other questions, cannot be definitely settled previously to the hearing in chancery.

Judgment for the plaintiffs.

SAMUEL PUTNAM vs. SAMUEL B. CUSHING.

A mortgagee of chattels may maintain replevin for them after their attachment by trustee process against the mortgagor, without making the demand required by Rev. Sts. c. 90, §§ 78, 79.

A mortgage of leather, cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor.

REPLEVIN of eleven cases of brogans. At the trial in the superior court of Suffolk at May term 1856, it appeared that George A. Putnam made to the plaintiff a mortgage of brogans, and of stock for the manufacture of brogans, which stock was then cut and prepared for the soles and the upper leather to be closed, and was afterwards made up into brogans by the mortgagor; that some of the brogans mortgaged, and of the brogans so made up from the mortgaged stock, were delivered by the mortgagor to the defendant for sale, and while in the defendant's possession were attached by trustee processes against the mortgagor, which were still pending.

The defendant objected to the maintenance of the action, that the plaintiff had not made a demand upon the attaching officer, as required by the Rev. Sts. c. 90, §§ 78, 79; and that the mortgage of stock did not cover brogans manufactured out of it at the expense of the mortgagor.

But *Huntington, J.* overruled both objections, the jury re-

turned a verdict for the plaintiff, and the defendant alleged exceptions.

W. Brigham, for the defendant.

T. F. Nutter, for the plaintiff.

DEWEY, J. 1. There was no such attachment of the mortgaged property in the present case as made it necessary for the mortgagee to make the demand required by Rev. Sts. c. 90, §§ 78, 79. The provisions of the statute apply to an attachment of goods by an actual seizure of the same. In such case, before the mortgagee can maintain an action to recover possession of the same, or damages therefor, he must make a statement of his claim to the attaching creditor or officer, and demand payment of the same. If not paid in the time required by law, "the property shall be restored to him." But in the present case, the attachment is by trustee process, leaving the property in the hands of a third person, and under a form of attachment setting forth that it cannot be seized by the officer in the usual way. It is said that if this be so, you cannot effectually attach mortgaged goods and chattels by the trustee process merely, but must go further and make an actual seizure of the same. This may be so, so far as the provisions of c. 90, §§ 79, 80, are to be called in aid of the attachment. In the case of goods and chattels, they would ordinarily be open to actual attachment, and all the benefits of the statute might be secured by making such actual seizure. However that may be, in the opinion of the court, a mere attachment by serving a trustee process upon the person who may be in possession of the same would not defeat the right of the mortgagee to reclaim the goods mortgaged to him, by a writ of replevin against such person, without making a statement of the amount of his lien, and making demand of payment therefor.

2. The only remaining exception now relied upon is that the mortgage of the stock for the manufacture of the brogans would not entitle the plaintiff to hold his lien upon the brogans after they were manufactured from such stock. In the opinion of the court, the property still remained in the mortgagee, notwithstanding the change by the completion of the work as orig-

Hewes v. Hanscom.

inally designed, the materials being cut and prepared therefor before the mortgage. It was not the case of a new acquisition of articles of property, not held by the mortgagor at the time of making the mortgage; but merely of labor performed upon materials and stock of the plaintiff acquired by his mortgage. In such case, the accession will pass to the mortgagee.

Exceptions overruled.

GEORGE W. HEWES vs. WILLIS HANSCOM.

An agreement between the maker and the payee of a promissory note, that it shall be deemed to be paid by being allowed in discharge of a mortgage from the payee to a third person, cannot have that effect without the assent of that person.

ACTION OF TORT for malicious prosecution and false imprisonment. At the trial in the superior court of Suffolk at September term 1856, before *Nelson*, C. J., it appeared that the prosecution complained of was an action upon a promissory note of the plaintiff's for \$42, payable to Charles Curry; and the plaintiff offered evidence to prove the following facts, many of which were controverted by the defendant.

The plaintiff, while in California, sent home the sum of \$160 to his mother, to be lent by her to his brother Elijah Hewes, which she did, and he gave her back a note and mortgage on his blacksmith shop and tools, which she has ever since had, and has tried to collect. Subsequently Elijah Hewes formed a copartnership with the defendant under the name of Hewes & Hanscom, and then the defendant undertook to pay this note and mortgage given by Elijah Hewes to his mother. The plaintiff's note was offered to Hewes & Hanscom in payment for work, and they corresponded with the plaintiff about it; he at first denied his liability upon it, but finally consented that they should take it and apply it on the mortgage to his mother; his mother afterwards applied to Elijah Hewes for a payment on the mortgage in the defendant's presence, and he

referred her to the defendant, who promised to pay her. The partnership of Hewes & Hanscom was afterwards dissolved, and by arrangements between them Elijah Hewes released the defendant from his promise to pay the mortgage, and the plaintiff's note became the defendant's property.

"The plaintiff asked the court to instruct the jury, that if they were satisfied that there was between the parties a question as to the validity of the note against this plaintiff, and the defendant took the note after negotiations with the plaintiff, under an agreement to apply it on the mortgage, and the defendant took the note up, paying for it in work, to apply as cash on the mortgage, and the plaintiff agreed to its being taken up only for that object, and Elijah Hewes transferred his half interest to the defendant for the purpose and with the understanding of having it so applied, the defendant had no cause of action on the note, till he had offered so to apply it, and had been refused; and no release by Elijah Hewes afterwards would avail against this plaintiff, unless assented to by him. This instruction, in these terms, was refused.

"The court instructed the jury in regard to the legal nature of the action for malicious arrest and prosecution, and the burden of proof in such action, and submitted to the jury the whole question of fact; also that, on one part of the case, if the plaintiff had furnished the \$160, and had voluntarily paid the mortgage to his mother, and she afterwards undertook to hold and control it, then there would afterwards be no legal privity, as regarded the mortgage, between the plaintiff and the defendant; and though it might have been agreed between them that the \$42 Curry note should be paid by the mortgage, yet, under the circumstances, it would not be paid till an indorsement had been made on the mortgage note. On these instructions the jury returned a verdict for the defendant, and to the above instructions and refusals to instruct the plaintiff excepts."

W. L. Burt, for the plaintiff.

S. C. Maine, for the defendant.

THOMAS, J. It is not easy to understand from the bill of ex-
VOL. X.

ceptions the precise aspect which the cause assumed at the trial, or the precise instructions given to the jury. A prayer for instructions by the plaintiff is stated in the bill, and it is said that "this instruction, in these terms, was refused." The bill proceeds to state that general instructions were given as to the nature of the action and the burden of proof; and that as to one part of the case the instructions were given which are particularly set forth in the bill.

The instructions so reported were, it seems to us, correct. Whether an executory agreement of the plaintiff and defendant, that the note should be deemed to be paid by being allowed in discharge *pro tanto* of a mortgage held by the plaintiff, could be regarded as in itself payment and a bar to a suit upon the note, it is not necessary to determine. But it is plain that such agreement could not be treated as payment, where the legal title to the mortgage was in a third person, and that third person assume to control the mortgage and to enforce its collection.

The bill of exceptions shows no error in the instructions of the court below, to justify this court in setting aside the verdict and granting a new trial. The plaintiff, seeking a new trial, must clearly establish such error. If he fails to do so, the verdict must stand. It may be possible that the bill of exceptions does not fully present the points of law the plaintiff wished to make; but on the other hand, looking at the general aspect of the case as developed in the bill, it is difficult to suppose that upon an original suit, presenting so many controversies of fact and difficulties of law, an action for malicious prosecution could be maintained.

Exceptions overruled.

EDWARD H. BARKER & others vs. EDWIN PARKER.

An accommodation indorser, before maturity, of a negotiable promissory note, given to a mutual insurance company for premiums, who has been obliged to pay the amount thereof to a subsequent indorsee, may recover the amount so paid of the maker, on a count for money paid; or, *it seems*, as indorsee of the note; although when he indorsed the note, the insurance company, as he knew, had become indebted to the maker for the amount of a loss larger than the amount of the note.

ACTION OF CONTRACT by the second indorser against the maker of a negotiable promissory note. The declaration contained two counts, one for money paid, and the other on the note.

At the trial in the superior court of Suffolk, at November term 1856, there was evidence of these facts: The note was made by the defendant, payable to the Commercial Mutual Marine Insurance Company for a policy of insurance, and indorsed by them, and at their request by the plaintiffs, Edward H. Barker & Company, in order to enable them to have it discounted, which they did, by the Bank of Commerce. At its maturity the note was duly demanded and protested, and the insurance company being unable to pay it, the plaintiffs took it up and commenced this action. Before the plaintiffs indorsed it, a loss amounting to more than the amount of the note had occurred under a policy issued by the insurance company to the defendant, and been duly adjusted, which the defendants sought to set off in this suit. The plaintiff who made the indorsement on the note was a director in the insurance company and cognizant of the loss, and of the company's liability thereon.

Huntington, J. ruled that upon these facts the plaintiffs could not recover. A verdict was taken for the defendant, and the plaintiffs alleged exceptions.

F. A. Brooks, for the plaintiffs.

C. T. Russell, for the defendant, cited 2 Robinson's Pract. 224, 226 & cases cited; Story on Notes, § 133; *Richardson v. Lincoln*, 5 Met. 201; *Moies v. Bird*, 11 Mass. 436; *Tenney v Prince*, 4 Pick. 385; *Oxford Bank v. Haynes*, 8 Pick. 423

Barker & others v. Parker.

Bromage v. Lloyd, 1 Exch. 32; *Emmett v. Tottenham*, 8 Exch. 884; *Thompson v. Hale*, 6 Pick. 259; *Cone v. Baldwin*, 12 Pick. 545; *Merriam v. Granite Bank*, 8 Gray, 254.

DEWEY, J. The relation of the plaintiffs to the note in suit was that of second indorsers of a negotiable promissory note of the defendant, who became such indorsers before the maturity of the note, and who, upon the neglect of the maker to pay the same, became liable therefor to a subsequent indorsee holding the note by a transfer before the same was due, and who had made the plaintiffs chargeable with the payment of the same by making a proper demand upon the maker, and giving due notice to the plaintiffs as indorsers. The indorsee thus holding the note before maturity was the Bank of Commerce. As respects the right of the Bank of Commerce to have recovered the note of the defendant, no question can exist.

A liability also devolved upon the plaintiffs, by reason of their indorsement, to pay the same, if not paid by the defendant. Such liability by reason of the indorsement gave the plaintiffs a right to recover of the maker for money paid by them as such indorsers, independently of any right or title to the note itself, acquired by a transfer to them from the Bank of Commerce. The defendant, by putting in circulation a negotiable promissory note, payable to the promisee or his order, created that privity between himself and a second indorser, that such second indorser, upon being required to pay the same by reason of the default of the maker, might recur as well to the maker as to the first indorser for remuneration for the money thus paid.

As there was no good defence, by reason of any set-off against the insurance company, as against the claim of the Bank of Commerce, so there can be none against the claim of a second indorser, who has been obliged to pay the note to the Bank of Commerce, the note being in fact the note of the maker and given for his debt.

The fact that the plaintiffs became second indorsers at the request of the first indorser does not prevent their recurring to the maker in case the note is dishonored and they have been required to pay the same as indorsers.

Barker & others v. Valentine & another.

Nor do we perceive any legal objection to the right of the plaintiffs to recover under their second count, if it were necessary to resort to that. It is true that they received the note from the Bank of Commerce after it was due. Of course they took it subject to any defence that might have been made had it been sought to be enforced in a suit by the Bank of Commerce. But no set-off or other equitable defence existed as against the Bank of Commerce. So far as any set-off is relied upon by reason of a demand due from the insurance company to the defendant, as it could not avail as against the bank, it would seem to be also unavailing as against a party who had succeeded to the rights of the bank by a transfer from them.

In the opinion of the court it was not competent in defence of this action to introduce the matter relied upon in the answer; and the ruling of the superior court, that the facts found or admitted constituted a valid defence, was erroneous.

Exceptions sustained.



EDWARD H. BARKER & others vs. HENRY C. VALENTINE
& another.

In an action by an indorsee against the maker of a negotiable promissory note, payable to an insurance company, and indorsed to the plaintiff before its maturity, claims against that company cannot be set off, although the indorsee knew that the note was given for premiums of insurance.

ACTION OF CONTRACT on a promissory note, payable to the Commercial Mutual Marine Insurance Company or order, and indorsed by them to the plaintiffs, and bearing on its face the number of a policy for which it was given.

At the trial in the superior court of Suffolk at November term 1856, the defendants proved a loss under the policy, which had not been paid, and sought to set it off against the note; and it was proved that one of the plaintiffs was a director of the company, and knew that the note was given for premiums.

Huntington, J. instructed the jury, "that as the plaintiffs, or one

Barker & others v. Valentine & another.

of them, had actual notice, when they received the note declared upon, that it was a premium note given by the defendants to said company for premiums of insurance, upon the facts found or admitted in the case, they took it so far subject to such equities and such defences as the same would have been subject to, if held by the company."

A verdict was taken for the defendants, and the plaintiffs alleged exceptions, which were argued before the decision of the next preceding case of *Barker v. Parker*, ante, 339.

A. H. Fiske, for the plaintiffs, was stopped by the court.

M. G. Cobb, for the defendants, cited Rev. Sts. c. 37, § 31, St. 1851, c. 281, §§ 13-17, 20; *Williams v. Cheney*, 3 Gray, 215, and 8 Gray, 206; Chit. Con. (8th Amer. ed.) 265; 1 Greenl. Ev. § 112.

THOMAS, J. The note in suit was given to the Commercial Insurance Company for premiums of insurance. It is a negotiable note. It was negotiated and indorsed to the plaintiffs, for value, before its maturity. The fact that the note was given for premiums of insurance was known to the plaintiffs when they took it, that is, they knew that the consideration of the note was a good one.

The presiding judge instructed the jury that the plaintiffs, by reason of such knowledge, took the note subject to the equities and defences to which it would be liable in the hands of the insurance company, and that the defendants might avail themselves, in defence to this suit, of claims accruing against the insurance company, even after the negotiation of the note.

Obviously these instructions take the note in suit out of the ordinary well settled rules of law. The contract of the defendants was not simply to pay the insurance company, but to pay whomsoever the insurance company should order them to pay. If the contract was a legal one, if there was nothing in the relation of the makers of the note to the insurance company, which would prevent their giving, or the company receiving and using, a negotiable note for premiums of insurance, the instructions given to the jury were erroneous. We listened to the argument of counsel; we have examined the statutes on the subject

Noxon v. De Wolf & another.

of mutual insurance companies; without discovering any ground upon which we can say that the contract could not be lawfully made, or enforced as made.

The only case relied upon by the defendants' counsel is that of *Williams v. Cheney*, 3 Gray, 215. That case, we think, proceeds upon the ground that mutual insurance companies might well take a negotiable note; that a *bona fide* holder of this note for value might maintain his action upon it; and that the action of the insurance company and of the maker of the note after its negotiation could not impair the rights of the indorsee. The case, as we understand it, is in conflict with the grounds of defence relied on in the case at bar.

Exceptions sustained

ALFRED NOXON *vs.* THOMAS L. DE WOLF & another.

In an action by an indorsee against the maker of a negotiable promissory note, indorsee by the payee in blank, to which the defence is failure of consideration, the presumption is that it was transferred to the plaintiff on the day of its date, unless the defendant shows that the note was indorsed after maturity, or remained the property of the payee after the indorsement.

In an action by an indorsee against the maker of a negotiable promissory note, payable at a future day, and indorsed in blank by the payee, the judge refused to instruct the jury that "the burden of proof, the evidence being contradictory, was on the plaintiff to show that the note was discounted by him before it became due;" and instructed them that "if the plaintiff discounted the notes before they were due, and for a valuable consideration, in good faith, he was entitled to recover," and that "the presumption from the notes themselves was that they were indorsed on the day of their date; and if they were shown to have been in the hands of the payee after that time and before they were due, the presumption continued that the indorsement was made after the time when they were thus shown to be in the hands of the payee, and before they were due; and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff after they were due, or that they remained the property of the payee." The defendant did not specifically except to this instruction, nor call the attention of the court to the distinction between *prima facie* evidence and changing the burden of proof. *Held*, that he had no ground of exception.

In an action by the indorsee against the maker of a negotiable promissory note, the testimony of a bookkeeper who examined the plaintiff's books at a time not shown to have been after the indorsement, that the books showed that all the payee's notes had been sent to the indorsee for collection, but he could not say the note in suit was enumerated among those sent, is inadmissible for the plaintiff.

Noxon v. De Wolf & another.

ACTION OF CONTRACT by an indorsee against the makers of the following promissory note:

"Boston, October 18, 1853. Fourteen months after date we promise to pay the Hudson River Marine and Fire Insurance Company or order, for value received, three hundred and thirty dollars $\frac{1}{2}\%$, payable at Tremont Bank, Boston.

"Thomas L. De Wolf & Co."

At the trial in the superior court of Suffolk at March term 1856, before *Nelson*, C. J., the defendants relied upon the fact that the note was a premium note, given by them for a policy of insurance on a vessel for one year, with liberty to cancel the policy, paying a *pro rata* premium, if the vessel should be sold within the year, which was done, and a proportion only of the premium therefor was due.

The defendants also offered evidence that, before the note became due, a loss to an amount exceeding the sums payable on the note, happened to another vessel on which they had insurance at the same office. It was admitted that the plaintiff took the note with knowledge that it was a premium note; but there was no evidence of any knowledge on his part of the terms of the contract of insurance, or of the cancelling of the policy, or of the loss.

The presiding judge ruled, that if the plaintiff discounted the notes before they were due, and for a valuable consideration, in good faith, he was entitled to recover.

The plaintiff offered evidence that he discounted the notes on the 21st of February 1854, before they became due. The defendants offered evidence to show that the notes were in the possession of the insurance company till the 15th of February, and that the company stopped business on the 21st; and then offered the testimony of a book-keeper that he had thoroughly examined the books of the company on the 26th of February 1855, and that it appeared on their books that all their premium notes were left with the plaintiff for collection, but he could not say that these two notes were entered among them. The presiding judge excluded the testimony.

Upon the evidence the defendants argued to the jury that the

notes were not discounted by the plaintiff, but were left for collection; and contended that the burden of proof, the evidence being contradictory, was on the plaintiff, to show that the notes were discounted by him before they became due; and argued that the bookkeeper's testimony was not entitled to credit. The residue of the bill of exceptions was as follows:

"The presiding judge in his charge left to the jury the single question, whether the notes were discounted by the plaintiff before they were due, in good faith, without notice; and instructed them that the presumption from the notes themselves was that they were indorsed on the day of their date; and that if they were shown to have been in the hands of the insurance company after that time, the presumption continued that the indorsement was made after the time when they were thus shown to be in the hands of the insurance company, and before they were due; and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff after they were due, or that they remained the property of the insurance company.

"The jury found a verdict for the plaintiff, and the defendants excepted to the instructions and rulings of the court."

C. W. Loring, for the defendant. 1. The judge erred in ruling that the burden of proof was on the defendants to show that the notes remained the property of the payees or were passed after they were due. *Burnham v. Allen*, 1 Gray, 496. *Delano v. Bartlett*, 6 Cush. 364. The defendants, having contended and expressly requested the judge to rule that the law was otherwise, were not bound to except specifically to his ruling before verdict. *Buckland v. Charlemont*, 3 Pick. 173.

2. The bookkeeper's testimony should have been admitted. The acts of the insurance company might be proved by its records; and those not being within the compulsory jurisdiction of the court, secondary evidence of their contents was admissible. *Boyle v. Wiseman*, 11 Exch. 360. *Doe v. Ross*, 7 M. & W. 102. *Brown v. Wood*, 19 Missouri, 475. The books were competent to show that the corporation had not authorized the notes to be indorsed to the plaintiff for discount. An-

Noxon v. De Wolf & another.

gell & Ames on Corp. § 680. *Union Bank v. Knapp*, 3 Pick. 96.

P. W. Chandler & G. O. Shattuck, for the plaintiff.

DEWEY, J. 1. The plaintiff sues as indorsee of a negotiable promissory note, payable at fourteen months after date, and proves the execution of the note by the maker, and an indorsement duly made by the payee, without any written date. The defence set up by the maker as to a part of the note is, that it ought not to be enforced, because the consideration was the receipt from the payee of a policy of insurance which was subsequently cancelled in part by agreement of the parties, thereby reducing the sum that ought to be paid thereon; and as to the residue, that before the note became due, an indebtedness to a greater amount from the payee to the maker had arisen by reason of a loss on another policy on a different vessel.

The plaintiff denies the right of the maker to interpose this defence as against an indorsee, holding the note duly indorsed in the manner this was; and contends that before such defence can be made available, the defendant must show that the note was overdue when it was indorsed; and such was the ruling of the court before which the case was tried.

No doubt, in a suit between the original parties to a promissory note, when the defence is want of consideration, the burden of proof is on the plaintiff. But the words "value received" make a *prima facie* case, sufficient to sustain that burden until it is overcome by other evidence put into the case. The cases of *Burnham v. Allen*, 1 Gray, 496, and *Delano v. Bartlett*, 6 Cush. 364, cited by the defendants, were between the original parties. But the party who executes a negotiable promissory note, payable at a future day, assumes towards an indorsee a very different relation from that which he bears to the payee himself while holding the note. Such defence of a failure in part of consideration, and an indebtedness to the maker by the payee, accruing before the maturity of the note, is only open to the maker upon the fact appearing that the note was negotiated after it was due, or in other words, was a dishonored note. Otherwise, the indorsee may well rely upon showing a nego-

tible note duly indorsed by the payee without date. If nothing more is shown, the plaintiff may enforce it as a note indorsed antecedently to its becoming due.

Thus it was held in *Hendricks v. Judah*, 1 Johns. 319, in an action by an indorsee of a promissory note against the maker, the latter will not be allowed to prove a set-off against the original payee, unless he previously shows that the note was transferred after it became due, or for the purpose of defrauding the maker. Such was the ruling of Spencer, J. at the trial, which was confirmed by the full court.

In *Webster v. Lee*, 5 Mass. 334, where, in an action by an indorsee against the maker of a promissory note, the defendant set up in defence a submission of all demands, including this note, to referees, a report and judgment thereon, it was held by the court that it was not the duty of the plaintiff, an indorsee by a blank indorsement, to show that he purchased the same before the articles of submission were made. Parsons, C. J. says, in that case, "if the maker of the note would set up the defence of payment, it is necessary for him to prove that the payment was made before the indorsement, or his defence will fail him."

In *Stevens v. Bruce*, 21 Pick. 193, which was an action by indorsee against maker, and the defence set up was payment to the payee, Morton, J. on the trial ruled that the defendant must first prove that the note was overdue before it was indorsed. In the consideration of the case by the full court, this ruling was assumed to be correct, and the only point of controversy was whether the defendant had introduced sufficient evidence to warrant the jury in finding that fact.

In the case of *Ranger v. Cary*, 1 Met. 369, the point seems to have been directly before this court, and the rule stated to be that "a negotiable note being offered in evidence, duly indorsed, the legal presumption is that such indorsement was made at the date of the note, or at least antecedently to its becoming due; and if the defendant would avail himself of any defence that would be open to him only in case the note were negotiated after it was dishonored, it is incumbent on him to show that the indorsement was in fact made after the note was overdue."

Noxon v. De Wolf & another.

The earlier case of *Wilbour v. Turner*, 5 Pick. 526, and the later one of *Hilton v. Smith*, 5 Gray, 400, seem to have recognized the same principle.

In *Parkin v. Moon*, 7 Car. & P. 408, it was held by Baron Alderson, that the burden of proving that the note was indorsed after it was overdue was upon the defendant, where he sought to defend by showing such facts as would constitute a good defence to a dishonored note; and this ruling, being submitted to the other judges, was confirmed by them.

It may be that under the more precisely accurate use of the term "burden of proof," as now held by the court, it would have been more correct to say that upon the production by the holder of a negotiable promissory note, indorsed in blank, the legal presumption is that it was indorsed at its date, and it is incumbent on the defendants to overcome that presumption by evidence. This must have been so understood in the present case, as the plaintiff had already produced a note thus indorsed, and the question was upon the effect of the testimony offered to show the fact that it was indorsed after overdue. Upon such a state of the case, it was the duty of the defendants to offer sufficient evidence to control the legal presumption arising from the indorsement of the note. In this sense the burden was on the defendants.

2. The exclusion of the testimony of the bookkeeper was correct. Without considering the broader question of the competency of evidence to show that, upon an examination of the books of a corporation, the witness did, or did not, find certain facts to be indicated by the books, it is sufficient to say that it does not appear that the entries testified of were made while the party making them had possession of the note now in controversy. Declarations of one who has been the holder of a bill of exchange or promissory note cannot properly be received in evidence, unless made while the party has possession of the bill or note. *Pocock v. Billing*, 2 Bing. 269, and 9 Moore, 499. *Bond v. Fitzpatrick*, 4 Gray, 91, and 8 Gray, 538.

It is also to be remarked that the witness says he cannot state that this note was among those entered upon the books

Newell v. Holton.

of the corporation as lodged with the bank for collection. The proposed evidence fails to establish any declaration of the company on their books that they had left this note with the bank or collection.

Exceptions overruled.

THEODORE NEWELL vs. FREDERIC HOLTON.

In an action against the maker of an accommodation note, the person for whose accommodation it was made is a competent witness to prove that he negotiated it for a usurious consideration, in another state, whose laws render usurious contracts void, to a par v from whom the plaintiff took it after maturity.

ACTION OF CONTRACT on a promissory note made by the defendant to Henry Burr or order, indorsed by the latter to Horace Burr and by him to Lot Newell.

At the trial in the superior court of Suffolk at September term 1856, it was admitted that the plaintiff took the note from Lot Newell after maturity. The defendant introduced evidence tending to show that the note was made by the defendant and indorsed by the payee for the accommodation of Horace Burr, without any consideration from either of them; and then offered the deposition of Horace Burr to show that he transferred the note to Lot Newell in New York for a usurious consideration, in violation of the laws of New York, which render all usurious contracts void. But *Nelson*, C. J. refused to admit it, on the ground that Horace Burr, being a party to the note, was not a competent witness to show that it was tainted with usury and void. The verdict being for the plaintiff, the defendant excepted to the rejection of this deposition, and to other rulings not material to be stated.

A. A. Runney, for the defendant.

A. H. Fiske, for the plaintiff.

DEWEY, J. It being conceded that the note was passed to the plaintiff after its maturity by Lot Newell, the same was subject to any defence that existed against it in the hands of

Newell v. Holton.

Lot Newell at the time when he transferred it to the plaintiff. If it shall further appear, as the evidence offered tended to prove, that this note was an accommodation note, made by the defendant at the request of Horace Burr, whose name appears as the second indorser thereon, and that it was in fact held by Horace Burr to be used by him to raise money thereon for his own benefit, having never been put in circulation before it was passed by him to Lot Newell, the note must be considered as first issued when negotiated to Lot Newell. In such case, if the note passed to Lot Newell upon an usurious agreement made with him by Horace Burr, such usury would affect the note, and might be set up in defence of the present action. To prove such usury Horace Burr would be a competent witness, his testimony being offered to prove an original, usurious contract made directly with Lot Newell.

As the law is now held in this commonwealth, an indorser of a promissory note may be a competent witness to a usurious contract made with the person to whom the note is first passed, when such person is the plaintiff, or some one taking the same under such circumstances as would subject him to the same defence as would avail against the party making the contract. Whatever reason there may have been, or whatever the rule may be, as to excluding a party standing in the relation of an indorser to a note, from defeating a note to which he has given currency, by testifying to a previous taint in which the party receiving it did not participate, being an innocent purchaser, it does not affect the present case, supposing Lot Newell, to whose rights the plaintiff succeeds, to have been himself a party to the usurious contract. To this extent the case of *Churchill v. Suter*, 4 Mass. 156, has been qualified, and it is unnecessary to go further in the present case. *Fox v. Whitney*, 16 Mass. 118. *Van Schaack v. Stafford*, 12 Pick. 565. *Thayer v. Crossman*, 1 Met. 416. *Bubier v. Pulsifer*, 4 Gray, 592.

Without expressing any opinion upon the other points discussed at the argument, for the reason we have stated there must be a new trial.

Exceptions sustained.

HENRY EMERSON vs. CHARLES E. WHITE.

A tender of the amount of a debt without costs is insufficient, after a writ has been sued out thereon, and sent to an officer for service, although not yet actually delivered to him.

ACTION OF CONTRACT. Answer, a tender of the amount of the debt. Trial and verdict for the defendant in the superior court of Suffolk at January term 1857, before *Nelson*, C. J., who signed this bill of exceptions :

" It was in evidence that the writ was made out at the plaintiff's request, and sent to the sheriff for service between the hours of nine and half past nine o'clock in the forenoon; that at or about eleven o'clock of the same forenoon the defendant made the tender and demanded a receipt in full; and afterwards, between said eleven o'clock and two in the afternoon, the defendant renewed his tender, but without condition, and was then informed that costs had been made; that on or about one o'clock of the same afternoon service of said writ was made by attachment of the defendant's property. The court ruled that for the purposes of the tender the commencement of the action was the time when the writ was delivered to the sheriff to be served. And to this ruling the plaintiff excepts."

E. Wright, for the plaintiff, cited *Gardner v. Webber*, 17 Pick. 407; *Badger v. Phinney*, 15 Mass. 364; *Bunker v. Shed*, 8 Met. 150; *Field v. Jacobs*, 12 Met. 118; *Johnson v. Farwell*, 7 Greenl. 370; 2 Greenl. Ev. §§ 602, 603, 605; Rev. Sts. c. 100, § 15.

J. H. Wakefield, for the defendant, cited Rev. Sts. c. 100, §§ 14, 15; *Tufts v. Kidder*, 8 Pick. 540; *Gardner v. Webber*, 17 Pick. 412; *Swift v. Crocker*, 21 Pick. 242; *Seaver v. Lincoln*, 21 Pick. 269; *Bunker v. Shed*, 8 Met. 152; *Underwood v. Tatham*, 1 Ind. 276; *State Bank v. Cason*, 5 Eng. 479.

DEWEY, J The ruling of the superior court "that for the purposes of the tender, the commencement of the action was the time when the writ was delivered to the sheriff to be served," was not correct. After the writ was actually made, and measures taken, as in the present case, to secure the service of the same by sending it to the sheriff, a tender of the amount

Stickney & another v. Allen.

of the debt without the costs would not be a valid tender, although there had been no actual delivery of the writ to the sheriff. If the evidence established the fact that the writ was made out, and sent to the sheriff for service, as the bill of exceptions assumes, prior to half past nine o'clock, and the tender was not made until eleven, the court should have instructed the jury that the tender should have been of the amount of the debt and the costs that had accrued, to make it an effectual tender.

Exceptions sustained.

RUFUS B. STICKNEY & another vs. BENJAMIN F. ALLEN.

A mechanic who has agreed to repair and alter stereotype plates, in consideration of being allowed to do the owner's printing for an indefinite time, has no lien on the plates on account of repairs and alterations, when, after several years, the owner withdraws the printing from him.

A lien for work done on chattels is lost by voluntarily surrendering the possession of them to the owner or his agent.

An owner of stereotype plates in the possession of a mechanic who refuses to give them up, except on payment of a bill due for printing, and also of a bill for repairs on the plates, which is not due, is not bound to tender payment of the bill already due if he is ready to pay it on the delivery to him of the plates.

The measure of damages against a wrongdoer for the conversion of plates for printing labels or advertisements, of great value to the owner, but of very trifling value to others, is the value to him; and in estimating this the cost of replacing the plates may be considered.

In an action for the conversion of chattels to the defendant's use, the measure of damages is not affected by the defendant's having, after the conversion, attached them on mesne process against the plaintiff, and then discontinued that action and offered to restore them to the plaintiff, who refused to receive them.

ACTION OF TORT for converting to the defendant's use stereotype plates, the property of the plaintiffs. The declaration alleged no special damage.

The answer denied the plaintiffs' allegations; and alleged, 1st. That the defendant had a lien on the property; 2d. That the property had been attached on a writ in favor of the defendant against the plaintiff, and, on the discontinuance of that action, restored by the attaching officer at the defendant's direction to the plaintiff.

At the trial in the superior court of Suffolk at September term 1856, before *Nelson*, C. J., the following facts were in evidence :

In 1849 the defendant, an engraver, occupied the same place of business with one Carlton, a printer, who did the plaintiffs' printing under a contract to keep the plaintiffs' plates in order, in consideration of having their printing at certain rates. In the same year the defendant made alterations on some of the plates, and manufactured others for the plaintiffs. The new plates were paid for as the bills for them were presented, but some of the alterations were not paid for ; and the plates, new and altered, went into Carlton's hands, as the property of the plaintiffs, to print from. In 1852 Carlton died, and the defendant went into the printing business, and made a contract with the plaintiffs, under which he did their printing till July 1855, when the plaintiffs notified him that they should have their printing done elsewhere ; and repeatedly demanded of him their plates, which he refused to give up, unless first paid for the printing and the alterations and repairs.

Before this refusal, the defendant having sent to the plaintiffs his bill for printing, in which was no charge for any alterations or repairs, one of the plaintiffs came with it to the defendant, with money sufficient to pay it, as rendered ; the defendant then made a claim for repairs ; the plaintiffs offered to pay the bill for printing as rendered, and demanded the plates ; but the defendant refused to give them up unless his claim for repairs was also paid, and gave no other reason for not taking the money offered. The plaintiffs would not have paid any money unless they got the plates, but were ready to pay the amount of the bill for printing if they got them.

The defendant requested the court to rule, that if the privilege of having the plaintiffs' printing was a consideration for making the alterations and repairs, yet the plaintiffs, having taken away the former, were bound to pay for the latter. But the court instructed the jury that if in consideration of the printing the defendant had agreed to make the alterations without charge ; and the contract, for the continuance of which no time had been fixed, had yet continued and been carried out for several

years, and then been given up; the defendant would have no lien on the plates on account of the alterations; and the jury might presume that the continuance of the contract had remunerated the defendant for the alterations, if any remuneration was needed.

The plaintiffs contended that the defendant, by delivering the plates to Carlton and allowing him to use them, had relinquished the possession and lost his lien, and that his subsequently receiving the plates again would not revive it. The defendant requested the court to rule that a permissive use of the plates by Carlton, in the place of business jointly occupied by him and the defendant, was not such parting with the possession as would divest the defendant's lien, if the defendant did not allow them to go into the plaintiffs' possession or control, and afterwards received them from Carlton, and made further alterations and repairs on them. But the court instructed the jury, that if the defendant voluntarily parted with the possession to the plaintiffs or their agent, he lost his lien and could not reassert it.

As to the tender, the defendant asked the court to rule, that a mere readiness to pay, unaccompanied with a tender of the money, would not dissolve the defendant's lien, if he had any. But the court instructed the jury upon this point, that "a mere readiness to pay a legal and good demand would be insufficient; but if the plaintiff expressed a willingness to pay any fair and proper bill of the defendants, and said he had the money wherewith to pay it, and really had it present, and offered it, and the defendant refused to deliver the plates unless a further bill for repairs and alterations was also paid, and the readiness to pay was not acceded to for that reason, and the jury found that the bill for repairs was not due, then the defendant could not object that a legal tender for the amount due on the bill for printing was not made."

It appeared that the plates were of very trifling value except to the plaintiffs, but of great value to them, and that they had been obliged to replace them at considerable expense. The defendant contended that in this form of action the rule of damages

was the market value of the articles. But the court ruled, that the plaintiffs might show the fair value of the articles to themselves, and, as bearing on the question of value, the cost of replacing them, and that the fair worth of the articles to the plaintiffs would be the measure of damages.

It appeared that after the plaintiffs' demand upon the defendant, and before the bringing of this action, the plates were attached on a writ sued out by the defendant against the plaintiffs on said bills; whereupon the plaintiffs tendered payment for the printing, and that action was discontinued, "and the officer undertook to restore the property to the plaintiffs, who refused to receive it, and in some way it came back to the officer, in whose hands at the time of the trial it still remained." The court ruled that the damages would not be affected by the attachment and the alleged return, "if the plates were rightly not accepted by the plaintiffs."

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

R. F. Fuller, for the defendant.

O. Stevens, for the plaintiffs.

METCALF, J. The court are of opinion that no error in the trial of this cause is shown by these exceptions.

1. The judge rightly instructed the jury that if the agreement of the parties was, that the defendant, for the sake of doing the printing for the plaintiffs, should do it for a certain sum, and should also make alterations in the plates, without charge, in consideration of doing the printing for an indefinite time, and if the parties acted on this agreement for several years, and then gave it up, and thereupon the plaintiffs demanded the plates, then the defendant had no right to withhold them; and that the jury might presume that the continuance of the agreement had remunerated the defendant for making alterations in the plates. The effect of this instruction was, that a mechanic has no lien on property for labor done on it, when he agrees to do that labor in consideration of being employed and paid by the owner of the property to do other labor for him; such agreement is inconsistent with a right of lien, or is a waiver of it;

Stickney & another v. Allen.

and a jury may rightly presume that the pay received for the other agreed labor is a remuneration for that which is done on the property ; it is what he agrees to take, whether a remuneration or not.

2. There can be no doubt of the correctness of the ruling, that if the defendant voluntarily parted with the possession of the plates to the plaintiffs or their agent, he lost his lien and could not reassert it. *Smith's Merc. Law*, (5th ed.) 540. This ruling was made on the hypothesis that the defendant once had a lien.

3. Taking the whole of the next ruling together, it is manifestly right ; being thus : If the jury find that the defendant's bill for repairs of the plates was not due, and that he refused to deliver them to the plaintiffs, on their demand, unless they would pay that bill, then they were not bound to tender payment of the bill which they owed him for printing, if they were ready to pay it on his giving up the plates. *Adams v. Clark*, 9 Cush. 215. This ruling was made on the hypothesis that the defendant had a lien on the plates for his bill for printing.

4. The proper rule of damages was prescribed by the judge, namely, the fair value of the plates to the plaintiffs. And he allowed the jury to take into consideration, in estimating that value, the cost of replacing the plates. The defendant insists that the market value was the true rule of damages. And this is doubtless the general rule in trover. But this rule presupposes the conversion of marketable property. Whereas, in this case, it was admitted by the defendant's counsel, in argument, that the plates in question were made for the printing of labels or advertisements in the plaintiffs' names, which were to be used by them only, in their special business ; and the exceptions show that it was in evidence that they were of very trifling value, except to the plaintiffs. Such things cannot with any propriety be said to have a market value. And the actual value to him who owns and uses them is the just rule of damages in an action against him who converts them to his own use. *Suydam v. Jenkins*, 3 Sandf. 621, 622.

There is no ground for the defendant's objection, that damage to the amount of the value of the plates to the plaintiffs alone

Willey v. Fredericks & another.

was special damage, and therefore not recoverable, because not alleged in their declaration. Special damage, in trover, is that which the plaintiff sustains beyond the mere loss of his property by its conversion. *Davis v. Oswell*, 7 Car. & P. 804. *Bodley v. Reynolds*, 8 Ad. & El. N. R. 779. If the plaintiffs, in this case, had offered evidence that by the loss of their plates their business was obstructed, it would not have been admissible, under their declaration, for the purpose of proving damage beyond the value of the plates. *Mayne on Damages*, 212.

5. The court, we think, correctly ruled that the attachment and return of the plates did not affect the question of damages.

Exceptions overruled.

TOLMAN WILLEY vs. ELEAZER FREDERICKS & another.

One who has contracted to build the sea-wall of a wharf, and failed to perform his contract, and, on being requested to rebuild it, promised to do so, and thereby induced the other party to delay rebuilding it himself, is liable for the loss of rent of the wharf occasioned by his own negligence.

ACTION OF CONTRACT to recover the expense of rebuilding the sea-wall of a wharf, which the defendants had undertaken to build, and had not built according to agreement.

At the trial in the superior court of Suffolk at January term 1857, the plaintiff offered evidence that "the defendants had not fulfilled their contract, and on several occasions between the 1st of January and the 1st of October 1855 had acknowledged that the sea-wall was not built according to their contract, and promised to rebuild it, but had neglected to do so; that the plaintiff informed the defendants that, unless they rebuilt the wall, he should do it at their expense; and that he rebuilt the wall in October and November 1855, at an actual expense of \$712; that the fair annual rent of the wharf was \$750; and that between January and October 1855 portions of the wall continued to fall, and gravel and filling to wash away."

Willey v. Fredericks & another.

Huntington, J. instructed the jury "that the plaintiff could only recover for such injuries as were the necessary, proximate and immediate consequence of the act complained of; and that the plaintiff would be bound to proceed to rebuild in a reasonable time, having regard to the season of the year and the nature of the work and all the attendant facts and circumstances; but that, inasmuch as there was evidence in the case tending to show that from the 1st of January 1855 to the time when he proceeded to rebuild he had from time to time, week to week, or very often, requested the defendants to repair the wall, and the defendants had as often promised they would; if the plaintiff was induced to delay, relying on these promises and undertakings, and it was through the defendants' fault that he did not rebuild, he might, in addition to the cost of rebuilding, recover for the loss of the use of the wharf, so far as it was the necessary and immediate consequence of the breach of duty by the defendants, for such period as he was induced to delay rebuilding by the promises, and neglect to fulfil such promises, on the part of the defendants; and the conduct and promises of the defendants were competent evidence to be weighed by the jury on the question of reasonable time."

The jury returned a verdict for the plaintiff for the sum of \$1462, and the defendants alleged exceptions.

I. W. Richardson & G. H. Kingsbury, for the defendants. In the absence of any promise or undertaking on the part of the defendants to repair or rebuild the wharf, it would have been the duty of the plaintiff himself to repair it within a reasonable time after he found it defective; and he could have recovered of the defendants only such damages as, with reasonable endeavor and expense, he could not have prevented. *Loker v. Damon*, 17 Pick. 284. *Miller v. Mariner's Church*, 7 Greenl. 51. 2 Greenl. Ev. § 260. If by the defendants' promises to repair the wharf the plaintiff was induced to delay doing it himself, the defendants were liable for the increased expense of repairing, caused by such delay, it being the natural, proximate result of their own fault; but they were not liable for the loss of rent, because that depended on the plaintiff's contracts and

Willey v. Fredericks & another.

engagements with other parties, and was a remote and speculative matter, depending on contingencies beyond the control of the defendants, and not contemplated by the terms of the contract. *Fox v. Harding*, 7 Cush. 516. *Waite v. Gilbert*, 10 Cush. 177. *Thompson v. Shattuck*, 2 Met. 615. *Blanchard v. Ely*, 21 Wend. 342. *Freeman v. Clute*, 3 Barb. 424. Sedgwick on Damages, (2d ed.) 37, 38.

H. F. Durant, for the plaintiff, cited *Fox v. Harding*, 7 Cush. 516; *Dickinson v. Boyle*, 17 Pick. 78; *The Narragansett*, 1 Blatchf. C. C. 211; *Clifford v. Richardson*, 18 Verm. 620; *Freeman v. Clute*, 3 Barb. 424; *Davis v. Talcott*, 14 Barb. 611; *Green v. Mann*, 11 Ill. 613; Sedgwick on Damages, 63; *Sewall's Falls Bridge v. Fisk*, 3 Foster, 171; *Waters v. Towers*, 8 Exch. 401; *Wilson v. York, Newcastle & Berwick Railway*, 18 Eng. Law & Eq. R. 557, note.

THOMAS, J. The exceptions are now confined to a single point, the right of the plaintiff to recover damages for the loss of the use of the land. The case finds that the sea-wall or wharf was not built according to the contract; that it was defective; and that the defendants promised to rebuild it. The ordinary rule undoubtedly is, that the plaintiff must repair or rebuild the defective wall within a reasonable time, and that the expense of such repair or reconstruction, and the loss of the use of the land for such reasonable time would be the measure of damages. What was a reasonable time was to be determined in view of all the facts in the case. One material fact was that the defendants, admitting their failure to fulfil their contract, promised to rebuild, and the plaintiff relying, as he well might, upon such promises, delayed himself the rebuilding of the wall. The question was, whether the delay caused by the promises of the defendants, and their failure to keep them, could enter into the consideration of what was reasonable time. The presiding judge in the court below instructed the jury that they might take them into consideration. We think he was clearly right. Upon notice to the defendants of the defects in the structure of the wall, and the promise of the defendants to rebuild, the plaintiff might well wait and give the defendants

Adams v. Wadleigh.

the opportunity to perform their promise ; and the delay so caused was as truly reasonable as that occasioned by the state of the season or other physical cause. Damages for the loss of the use of the land during such time are not remote, speculative or contingent, but the direct and immediate consequence of the defendants' failure to perform their contract and duty. The instructions to the jury were good law and good sense, clearly and accurately stated. *Exceptions overruled.*

AUGUSTUS ADAMS vs. DEXTER E. WADLEIGH.

In a deposition taken by commission objections to the form of interrogatories must be taken before the commission issues.

ACTION OF CONTRACT upon a promissory note. At the trial in the superior court of Suffolk at January term 1857, the defendant introduced in evidence a deposition taken by commission, to which the plaintiff then for the first time objected, because the interrogatories were leading, and because in one of them the defendant assumed a fact to have been stated in reply to a previous interrogatory, which the witness had not stated, and which had not been otherwise proved at the trial. *Huntington, J.* overruled the objection, and admitted the deposition. The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J. B. Robb, for the plaintiff.

E. F. Hodges, for the defendant.

DEWEY, J. The deposition of Boynton was properly admitted. The objections should have been specifically noted before the issuing of the commission. They go to the form of the interrogatories merely, and not to the competency of the evidence. *Allen v. Babcock*, 15 Pick. 56. *Potter v. Tyler*, 2 Met. 64. *Atlantic Mutual Fire Ins. Co. v. Fitzpatrick*, 2 Gray, 279.

Exceptions overruled.

ASA ADAMS vs. RICHARD BARRY.

it seems, that an action for injury to real estate of a wife may be maintained by her husband alone.

In an action of tort for obstructing a right of way, damages for the consequent diminution of rents cannot be recovered unless specially alleged in the declaration.

ACTION OF TORT for obstructing a right of way leading to an estate held by the plaintiff's wife in mortgage, "to the damage of the plaintiff, as he says, the sum of three hundred dollars;" which was the only allegation of damages. Trial and verdict for the plaintiff in the superior court of Suffolk at November term 1856, before *Abbott, J.*, to whose rulings the defendant alleged exceptions, the substance of which appears in the opinion.

W. Brigham, for the defendant.

J. B. Robb, for the plaintiff.

METCALF, J. At the argument of this case, the plaintiff, by consent of the defendant, exhibited evidence to the court, that the mortgage mentioned in the bill of exceptions had been foreclosed before this suit was commenced. We therefore need not inquire whether this action could have been maintained, if the mortgage had been outstanding. As the facts now appear, the plaintiff and his wife might have maintained the action, although the land described in the declaration was in the possession of tenants. *Cushing v. Adams*, 18 Pick. 110. It was also said in that case, that the plaintiff might have maintained the action, without joining the wife; that it was a case in which he might join her, or sue alone. And so are the decisions. *Allen v. Kingsbury*, 16 Pick. 235. 1 Roper on Husb. & Wife, 211. 2 Walford on Parties, 967 & *seq.*

But we are all of opinion that loss or diminution of rent was not, upon the declaration in this case, an element of damages, which the jury could legally take into consideration; and that, for this reason, the defendant is entitled to a new trial. The case comes within the decision in *Baldwin v. Western Railroad*, 4 Gray, 333, where it was held, upon great consideration, that under the practice act of 1852, c. 312, a general allegation of

Gorman & another v. Wheeler.

damages, in an action of tort, will not enable the plaintiff to prove special damages; that is, damages which the law does not imply from the facts alleged in the declaration. See also *Rising v. Granger*, 1 Mass. 49; *Warner v. Bacon*, 8 Gray, 400. In the present case, no damages for loss or diminution of rent can be implied by law, because such loss or diminution is not necessarily caused by the acts set forth in the declaration.

Exceptions sustained.

JAMES GORMAN & another vs. EMERSON WHEELER.

A factor, who takes a promissory note for goods sold on account of his consignor, and gives him reasonable notice of this and of the subsequent insolvency of the purchaser, does not, by proving the note under the insolvent laws and taking a dividend thereon, render himself liable for the full amount of the note, if he uses reasonable care and skill; although the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the discharge in insolvency.

ACTION OF CONTRACT to recover the proceeds of goods received by the defendant in Boston as a commission merchant, and sold by him there on account of the plaintiffs, who were citizens of New York.

At the trial in the superior court of Suffolk at November term 1855, it appeared that the defendant sold the goods on a credit of sixty days to the firm of Blood & Bent, who were then in good credit, and took their promissory note for the price, payable to himself or order; that before the maturity of the note Blood & Bent failed, and took the benefit of the insolvent law of Massachusetts, and obtained their certificate of discharge, and the defendant proved the note under the proceedings in insolvency against their estate, and received a dividend of thirty per cent. thereon; that the defendant was largely in advance to the plaintiffs, and the plaintiffs owed him more than the amount of the note, when he proved the claim in insolvency; and that he subsequently rendered an account thereof to the plaintiffs, charging back the amount of sale and crediting the dividend received.

The plaintiffs contended that the defendant by so proving the note had made himself liable therefor, unless he could prove that he was authorized by the plaintiffs so to do.

But *Nelson*; C. J. instructed the jury "that when the purchasers of the goods became insolvent after the sale, it became the duty of the defendant within a reasonable time to give notice of the transaction and of the insolvency to his consignors, the plaintiffs; that if, in giving such notice, he received any instructions, he was bound to follow them; but if he received no instructions, then he was bound to use all reasonable care and skill in managing the debt against the purchasers, for the best advantage of his consignors. He must not compromise the rights of the plaintiffs, if by the use of reasonable and proper care and skill he could avoid it; if he failed in these duties, then the plaintiffs could recover the amount of the sale. But if the defendant had taken the note according to the express direction of the plaintiffs, or had taken it, in the absence of any instructions, according to the usage of trade, and his principals, after notice, gave no instructions as to what course was to be pursued, the defendant could then prove the note in the ordinary course of proceedings in insolvency, and receive a dividend for the benefit of his principals, provided he in doing so acted with good faith, and with proper prudence, care and diligence for the best interests of his consignors; and the mere proof of the debt would not make him responsible for the amount." The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

H. J. Warner, for the plaintiffs, cited *Blackman v. Green*, 24 Verm. 17; Story on Agency, §§ 403, 413, 446; 2 Kent Com. (6th ed.) 623; *West Boylston Manuf. Co. v. Searle*, 15 Pick. 230.

H. F. Durant, for the defendant.

THOMAS, J. The only point of the exceptions relied upon at the argument was to the instructions of the court below upon the power and right of the defendant to prove the debt in insolvency. The goods were properly sold upon credit; the note well taken in the name of the consignee; the consignee was greatly in advance to the consignors. The purchaser of the

Gorman & another v. Wheeler.

goods and maker of the note having gone into insolvency, what might and should the consignee do with this note against the insolvent?

The court below instructed the jury, in substance, that the consignee was bound to give notice to the consignors of the note and of the insolvency of the maker, and to follow any instructions he might receive from the consignors, but, if he failed to receive any, to use all reasonable care and skill in collecting the debt for the consignors, and if, acting in good faith and with prudence and care for the best interests of the consignors, he proved the note in insolvency, such proof would not make him responsible for the amount of the note.

Of these instructions the plaintiffs surely had no just ground of complaint. Whether they contract and abridge the rights of the defendant it is not necessary to determine. There could not well be an absolute rule that the consignee should or should not prove a claim like this in insolvency. The question as between him and the consignors must, it would seem, be always one of good faith and reasonable diligence in the collection of the debt.

A point was made in the argument, which does not appear to have been suggested at the trial, that as the consignors were citizens of another state, and the note was not in terms payable in this commonwealth, the debt, if not proved in insolvency, would not have been discharged. The place of payment of the note does not clearly appear by the bill of exceptions. But assuming that fact to be as stated, yet as upon failure to prove the debt there could be no dividend, the effect of the discharge was one only of the facts to be weighed in determining what due diligence in the collection of the debt required.

The case cited by the defendant, of *Blackman v. Green*, 24 Verm. 17, does not seem to us to conflict with the instructions given to the jury in the court below. The case proceeded upon the ground that no notice was given to the consignor, and no opportunity given to discharge the lien of the consignee upon the note.

Exceptions overruled.

EDWARD HOUGHTON vs. JOHN WILSON.

A constable who arrests a debtor on execution and commits him to jail, but leaves no copy of the execution with the jailer, who therefore refuses to receive and detain him, cannot arrest him again on the same execution.

ACTION OF TORT for assault, battery and false imprisonment. At the trial in the superior court of Suffolk at November term 1856, it appeared that the defendant, a constable of the city of Boston, arrested the plaintiff on a writ of execution, and took him to the jail, but that the jailer refused to receive and detain the plaintiff, because the defendant had delivered to him no copy of the process under which the plaintiff was arrested; and that subsequently the defendant again took the plaintiff to the jail and committed him. There was contradictory evidence whether the plaintiff went voluntarily to the jail with the defendant the second time to test the validity of the first arrest. *Abbott, J.* instructed the jury that if the second arrest and commitment were voluntarily submitted to by the plaintiff, he could not maintain the action; but that if the plaintiff, although not resisting the officer, went to the jail against his will, and did not intend to waive his right to exemption from the second arrest, he was entitled to recover. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. L. Burt, for the defendant, cited *Appleby v. Clark*, 10 Mass. 59; *Brown v. Getchell*, 11 Mass. 13; *Gage v. Graffam*, 11 Mass. 183; *Little v. Newburyport Bank*, 14 Mass. 443; *Lansing v. Fleet*, 2 Johns. Cas. 3; 3 Steph. N. P. 2025; *Sheriff of Essex's case*, Hob. 202; *Buxton v. Home*, 1 Show. 174; *Ravenscroft v. Eyles*, 2 Wils. 295; *Trevillian v. Roberts*, 1 Rol. Ab. 307.

J. C. Park, for the plaintiff.

DEWEY, J. The ruling that if the defendant had no legal right to make a second arrest of the plaintiff, and commit him to jail, yet if the arrest and commitment were voluntarily submitted to by the plaintiff, then he could not maintain the action.

Newhall v. Paige & another.

was sufficiently favorable to the defendant. But that defence failed upon the facts, as was found by the jury.

The case then stood thus: The defendant, as a constable, had arrested the plaintiff and taken him to jail, and omitted to leave with the jailer any copy of the process by which he had been arrested, and under which he was to be detained a prisoner. Under these circumstances, when the prisoner was permitted to go at large without any commitment, it was an escape from the constable and not from the jailer, although the jailer refused to receive and detain him. In point of fact, he had not received him, and the escape by being permitted to go at large was an escape from the custody of the constable. It was also a voluntary escape, and being such, the same officer could not again arrest him on the same execution. By making such second arrest he became a wrongdoer, and, having committed him wrongfully, was properly held responsible for the arrest and the detention by virtue thereof.

Exceptions overruled.

HERBERT B. NEWHALL vs. ENOCH PAIGE & another.

The liability of a person who negligently receives goods not directed to him is the same as that of a bailee for hire or reward.

A contingent benefit is a sufficient consideration for undertaking a bailment.

ACTION OF CONTRACT, with a count in tort, to recover the value of merchandise sent from Portland, Maine, by steamboat to Boston, marked "H. B. Newhall, Saugus, care R. M. Morse, South Market St. Boston," and lost under the following circumstances: "Upon its arrival in Boston it was delivered to the teamster of the steamboat company, who took it to the defendant's store, where was the order box of an expressman who ran an express to Saugus. As this expressman did not run to that part of Saugus where the plaintiff lived, he told another expressman, George Towne, who kept a box in another part of

Newhall v. Paige & another.

the city, and went by the plaintiff's house, to call and take the merchandise. Towne called, paid the freight bill, and the defendants could not then find the merchandise. The only compensation received by the defendants for receiving and storing merchandise left for expressmen, and for allowing expressmen to have boxes in their store, was the advantage in bringing them business. The defendants kept a liquor store."

At the trial in the superior court of Suffolk at January term 1857 before *Huntington*, J., after proof of the above facts, the plaintiff asked the court to rule that this was a compensation sufficient to make the defendants bailees for hire; and that the defendants were strangers to the merchandise, inasmuch as it was improperly delivered to them, and could not excuse themselves from liability by proof of ordinary care and diligence; but that they were liable although there was no want of ordinary care on their part.

The court instructed the jury "that if the merchandise was received and delivered to be kept for hire or reward by the defendants, they would be bound to use ordinary care and prudence; that it was not necessary that the hire or reward should be for cash; that the storage might be taken for other consideration than money; but that it should be for some certain benefit, and not a mere contingent, uncertain and indirect benefit or expectation of benefit; that if the merchandise was delivered to the defendants on their voluntary undertaking to take care of it, without reward, their duty would be to exercise such care and prudence as they would use in their own affairs, and the plaintiff could not recover without proof of fraud or gross negligence; but that if the defendants were negligent in receiving goods not directed to them, in the manner stated in evidence, they would be bound to use ordinary care and prudence in the same degree as if they had received and kept them for hire or reward; and that the burden of proof was on them to show such care and diligence." The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

H. C. Hutchins, for the plaintiff.

J. C. Park, for the defendants.

Newhall v. Paige & another.

BIGELOW, J. The only error in this case was in the instructions given to the jury, and consisted in telling them that the defendant could not be considered a bailee for hire unless his compensation was for some certain benefit to himself, and that a mere contingent, uncertain and indirect benefit would not constitute such a consideration as was necessary to establish a contract of bailment for hire or reward. This was stating the proposition more broadly than the rules of law will warrant. A person becomes a bailee for hire when he takes property into his care and custody for a compensation. The nature and amount of the compensation are immaterial. The law will not inquire into its sufficiency or the certainty of its being realized by the bailee. The real question is, Was the contract made for a consideration? If so, then it was a *locatum* and not a *depositum*, and the defendants were liable for a want of ordinary care. The general rule as to the consideration of a contract is well understood, and is the same in case of bailments as in all other contracts. The law does not undertake to determine the adequacy of a consideration. That is left to the parties, who are the sole judges of the benefits or advantages to be derived from their contracts. It is sufficient if the consideration be of some value, though slight, or of a nature which may enure to the benefit of the party making the promise. *Haigh v. Brooks*, 10 Ad. & El. 320, and 2 P. & Dav. 484. *Lawrence v. McCalmont*, 2 How. 452. *Hubbard v. Coolidge*, 1 Met. 92. Where such a consideration exists, a contract cannot be said to be a *nudum pactum*, nor a bailment a gratuitous undertaking.

Exceptions sustained.

WILLIAM R. CARNES vs. JOHN C. NICHOLS.

A person who has illegally detained goods, which the owner has since agreed to accept and send for, is not liable for their destruction by fire without his fault, after the owner has had a reasonable time to remove them.

ACTION OF TORT against a wharfinger for the conversion of fifteen sticks of mahogany, part of a lot of thirty two sticks purchased by the plaintiff of Grace, the consignee of the mahogany, while lying on the defendant's wharf. Trial and verdict for the plaintiff in the superior court of Suffolk at March term 1856, before *Nelson, C. J.*, to whose rulings the defendant alleged exceptions. The facts appear in the opinion.

W. L. Burt, for the defendant.

G. O. Shattuck, (*P. W. Chandler* with him,) for the plaintiff, cited *Greenfield Bank v. Leavitt*, 17 Pick. 1, and *Curtis v. Ward*, 20 Conn. 204.

THOMAS, J. This is an action of tort (trover) for the conversion of a lot of mahogany, the property of the plaintiff. Of the conversion of the property by the defendant no question seems to have been made. The plaintiff purchased the property of one Grace. He demanded it of the defendant. The defendant refused to deliver, and claimed to retain it till certain charges upon it were paid. What the charges were does not appear, but both parties assume that they were not valid. Grace, of whom the plaintiff purchased, arranged the matter as to the charges with the defendant, and the plaintiff was informed he could have the mahogany. He might have declined to take it, and have recovered of the defendant its value. He did not decline to take it. He directed a teamster to get the mahogany and carry it to his mill. The teamster went, on the same day, to the wharf, and took one load of seventeen sticks, selecting the smaller sticks for his convenience in the carrying of them. The defendant made no objection to the removal in such manner or times as the plaintiff saw fit. The teamster did not remove the remaining fifteen sticks of the mahogany, but delayed removing them, for reasons of his own convenience, till the

afternoon of the next day, when they were destroyed by a fire which occurred without fault of the defendant. After the fire the plaintiff made a demand for the fifteen sticks destroyed by the fire. Upon these facts the defendant asked the court to instruct the jury as follows :

1st. " That if they were satisfied that the first detention of the mahogany for the alleged charges on it by the defendant was illegal, that was a conversion of the whole lot, and the plaintiff might have refused to receive any part of it afterwards, and the defendant would have been liable for the whole lot. But if the plaintiff afterwards was permitted by the defendant to receive, and thereupon directed his agent, the teamster, to go and get the whole lot, there being no arrangement or direction by the plaintiff that a part only should be taken, it was a return and acceptance of all that the plaintiff directed his agent to take and remove, and the defendant was entitled to have the value of that in mitigation of damages, unless the plaintiff was prevented by want of time, or circumstances beyond the plaintiff's control, from removing the whole."

2d. " That if they were satisfied that the first detention of the whole lot of mahogany by the defendant was illegal; but that, after the arrangement between the defendant and Grace, the plaintiff received, and directed his agent the teamster to remove the whole lot, there being no distinction made by the plaintiff or the defendant as to the part delivered and received; and the plaintiff proceeded thereupon to remove the mahogany, and did remove such part as he chose, and might have removed the whole, but left a part on the defendant's wharf for his own convenience, whereby such remaining part was destroyed by an accident without any fault of the defendant; the defendant was entitled to have deducted from the damages for the first conversion the full value of the mahogany at the time of its redelivery to the plaintiff, and acceptance by him, although it still remained on the defendant's wharf, and was eventually lost by the plaintiff."

We think the instructions prayed for correctly stated the law of the case. The mahogany returned to the legal possession and

Hoyt & another v. Robinson.

control of the plaintiff. If reasonable time had not intervened to remove the mahogany before the fire, the defendant might possibly have been liable for its full value. But if reasonable time for removal did intervene — and of this there can be, we think, no doubt — the plaintiff's only claim for damages would be for the detention of the goods, or other injury, before he resumed the control over them.

Exceptions sustained.

HUMPHREY HOYT & another vs. JOHN P. ROBINSON.

On *scire facias* against a trustee in foreign attachment, the defendant cannot avail himself for the first time of the objection that the money in his hands is due from him jointly with another person, upon whom no service was made, although he was named in the original writ; even if the money has since been attached by another person.

SCIRE FACIAS against the defendant as trustee of Jonathan Smith. The defendant, who had not answered the original writ, now answered that at the time of the service of that writ on him he had not individually any goods, effects or credits of Smith in his hands or possession; that there was a certain sum due to Smith from the firm of Kimball & Robinson, composed of Aaron Kimball and this defendant, but no service was made on Kimball, although residing in the Commonwealth and named as a trustee in the original writ; and that since the service of that writ, Charles H. Carroll had commenced an action against Smith and summoned Kimball & Robinson as trustees, which had been duly entered in court, and in which the partnership had duly appeared and answered.

The superior court of Suffolk gave judgment for the defendant, on payment of costs, and the plaintiffs appealed.

H. C. Hutchins, for the plaintiffs, cited *Parker v. Danforth*, 16 Mass. 303; *Sigourney v. Stockwell*, 4 Met. 518; *Wilcox v. Mills*, 4 Mass. 218; Cush. Tr. Pro. §§ 93, 355; *Springfield Card Manuf. Co. v. West*, 1 Cush. 388; *Hall v. Young*, 3 Pick. 80; Rev. Sts. c. 109, § 41.

Hoyt & another v. Robinson.

A. H. Fiske, for the defendant. The defendant must be discharged:

1st. Because, in order to make an effectual attachment of the property of a debtor in the hands of a partnership, all the partners residing in this commonwealth must be summoned as trustees. *Jewett v. Bacon*, 6 Mass. 62. *Kidder v. Puckard*, 13 Mass. 80. *Parker v. Danforth*, 16 Mass. 302. *Nash v. Brophy*, 13 Met. 476. *Warren v. Perkins*, 8 Cush. 518. *Rix v. Elliot*, 1 N. H. 184. In *Hathaway v. Russell*, 16 Mass. 473, the persons summoned as trustees, or who owed the debt intended to be attached, were not partners, and did not owe the debt as partners; but were tenants in common of a shop. If they are to be deemed partners, that case has been overruled by the subsequent decisions, or the law has been changed. Rev. Sts. c. 109, § 41.

2d. Because the rights of another party have intervened, the validity of whose attachment cannot depend upon the trustee in the former suit appearing at the return term of the writ or pleading in abatement. The plea or answer in abatement is taken away by the practice act. St. 1852, c. 312, § 56.

BIGELOW, J. The objection that the trustee could not be held liable for the money in his hands belonging to the principal defendant in the original action, because it was not due from him alone, but from himself and his copartner jointly, would have been valid, if seasonably taken. *Jewett v. Bacon*, 6 Mass. 60. *Nash v. Brophy*, 13 Met. 476. *Warren v. Perkins*, 8 Cush. 518.

But the omission to summon a joint contractor as trustee is properly matter in abatement, and if the person summoned as trustee desires to avoid the process on this ground, he must avail himself of the objection in answer to the original process. He cannot do it on the *scire facias*. This was distinctly adjudicated in *Hathaway v. Russell*, 16 Mass. 474. The provision in the Rev. Sts. c. 109, § 41, that a trustee shall be permitted on *scire facias* to plead and prove any matter that may be necessary or proper for his defence in the suit on the *scire facias*, was not intended to open the door for the trustee to plead matters in abatement to the original suit. Such

Greenwood v. Lake Shore Railroad Company.

matters are neither necessary nor proper to the defence of the suit on the *scire facias*. Being technical and dilatory in their nature, they must, on the well settled principles of the law be insisted on in an early stage of the case. *Pratt v. Sanger*, 4 Gray, 88. All matters which properly go to the merits of the suit against the trustees can be availed of in defence to the *scire facias* under the provisions of the statute above cited. But the original suit and the *scire facias* under the trustee process constitute only one continued and connected course of proceedings; and it would be a violation of principle to permit a technical defence, like the nonjoinder of a co-contractor with the person summoned as trustee, to prevail, when it was not pleaded until the last stage in the proceedings had been nearly reached.

It does not appear that the trustee has changed his situation, or in any way suffered by the omission to summon his copartner to answer in the suit. The commencement of another suit subsequently to the original action in this case, in which the members of the copartnership are duly summoned as trustees, cannot affect the liability of the trustee in this action. Being legally chargeable as trustee in this suit, he cannot be held liable in another action for the money which he has been compelled to pay on execution issued in this one. *Trustee charged.*

SAMUEL D. GREENWOOD vs. LAKE SHORE RAILROAD COMPANY.

The incorporation of defendants sued as a corporation may be denied after they have appeared generally and filed an affidavit of merits.

In an action of tort the defendants, alleged in the writ to be a foreign corporation, after filing an affidavit of merits, answered, denying their legal incorporation.

By the officer's return, it appeared that service was made upon the supposed agent of the defendants, and a chip attached as their property.

At the trial in the superior court of Suffolk at November term 1856, the defendants requested the court to rule, that the plaintiff must first produce and prove the act of incorporation of the defendants, and objected to other evidence being put in before such proof; and contended that the plaintiff could not maintain his action without it. But *Abbott, J.* ruled "that a general appearance and filing an affidavit of merits was sufficient, without proving the act of incorporation; and that after such appearance and affidavit of merits the defendants could not in this action deny that they were a corporation." The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

J. H. Bradley, for the defendants, cited *Middlesex Husbandmen & Manufacturers v. Davis*, 3 Met. 137; *Narragansett Bank v. Atlantic Silk Co.* 3 Met. 288; *Townsend v. Baptist Church in Lowell*, 6 Cush. 281, & cases cited; *Whitmore v. Congregational Society in Plymouth*, 2 Gray, 306; *Benthall v. Hildreth*, 2 Gray, 288; Gould Pl. c. 5, § 138.

H. F. Durant, for the plaintiff. The defendants, by appearing generally by attorney as a corporation, and as such filing an affidavit of defence upon the merits, and answering on the merits, have admitted that they are a corporation, and cannot afterwards say that they are not, or call upon the plaintiff to prove that they are. *Gilbert v. Nantucket Bank*, 5 Mass. 97. *Stone v. East Berkshire Congregational Society*, 14 Verm. 86. 1 Kyd on Corp. 285.

Dewey, J. The ruling of the superior court, that after an entry of a general appearance on the docket, and the filing of an affidavit of merits, or in the language of the statute, (*St.* 1852, c. 312,) that the party "verily believes that the defendants have a substantial defence to the action on its merits," it was not competent for the defendants in their answer to deny that they were a legal corporation and raise that issue, was erroneous. Such defence was open to the defendants, and was properly raised in their answer. The entry of a general appearance operated as a waiver of all objections to the want of a proper service of the writ upon the defendants, but did not affect the defence upon the merits.

Exceptions sustained.

LOTAN GASSETT *vs.* JONATHAN COTTLE.

After judgment has been rendered in the superior court, and exceptions allowed, though not entered in this court, the superior court cannot enter final judgment; but the original judgment may be affirmed by this court on complaint under the Rev. Sts. c. 82, § 14.

REPLEVIN. At January term 1856 of the superior court of Suffolk, the defendant obtained a verdict, and a judgment for the return of the goods replevied, and the plaintiff alleged exceptions to the rulings of the court, and the case was continued until November term 1856, when his exceptions were allowed. At January term 1857, on motion of the defendant, the former judgment was vacated and the case brought forward and judgment entered as of that term. The plaintiff appealed to this court.

W. L. Burt, for the plaintiff.

G. E. Betton, for the defendant.

DEWEY, J. The judgment of the superior court, rendered at January term 1857, which is now made the subject of an appeal for error in matter of law apparent on the record, cannot properly be affirmed. Upon inspection of the record of the proceedings in this case, it appears that at November term 1856 exceptions to the ruling of the presiding judge on the trial of the case, having been previously duly filed by the counsel, were allowed and signed by the judge. This having been done, the case was thereby removed from the further action of the superior court, and the proceedings were to be before this court; either upon a hearing upon the bill of exceptions, if duly entered; or by affirmation of the judgment of the court below, upon complaint duly filed by the other party, if the party taking the exceptions failed to enter the same. Rev. Sts. c. 82, §§ 12-14. In this state of the case, the proceedings of the superior court at January term 1857 were unauthorized, that court having no further jurisdiction in the case. The result is therefore that the judgment then rendered was erroneous, and must be reversed for that cause.

Rogers v. Sawin.

Under Rev. Sts. c. 81, §§ 34, 35, and c. 82, § 14, it will be still open to the party to apply for further proceedings, by way of petition to enter a complaint for an affirmance of the judgment of a former term, in reference to which the exceptions were filed and allowed. *Judgment of January term 1857 reversed.*

Upon a subsequent complaint of the defendant, praying for the entry of the action in this court, and the affirmation of the judgment rendered by the superior court at November term 1856, that judgment was affirmed, the defendant taking no costs since January term 1856.

Betton, for the defendant.

J. A. Andrew & Burt, for the plaintiff.

ENSIGN B. ROGERS *vs.* GEORGE H. SAWIN.
SAME *vs.* SAME.

By the law of Massachusetts, before *St.* 1852, c. 144, the mere uninterrupted continuance for more than twenty years of a window with a projecting sill, overlooking the land of another, did not necessarily create any easement of light or air.

ACTIONS OF TORT for entirely darkening, by building and continuing a wall, an ancient window in a house in Boston, to which the plaintiff alleged the light and air should of right come free and unobstructed. The answer denied the plaintiff's right.

At the trial in the superior court of Suffolk at January term 1857, before *Huntington*, J., the plaintiff introduced evidence that he held the estate by lease from the owner; that the window in question, which was in the fourth story of the house, had existed uninterruptedly from the year 1829 until the autumn of 1855, free and unobstructed, and then the defendant, in rebuilding his house, built his wall directly against the window in question; that the sill of the window projected over the defendant's land so much that it was cut off by the builders

when the defendant built the wall complained of; and that the title of the two estates had not been in the same person since 1826.

The plaintiff asked the court to instruct the jury that the free and unobstructed use of the window for more than twenty years prior to 1852, without interruption, especially if the sill of the window projected over the defendant's land, constituted an adverse use or enjoyment, the title of the two estates having been in different persons during that time.

But the court instructed the jury "that the mere open and unobstructed use of the window for light and air for more than twenty years prior to 1852 without interruption, either with or without the existence of the sill and the state of the title, did not necessarily constitute an adverse enjoyment, so as to enable the plaintiff to recover; that the word 'adverse' meant that the plaintiff's use must be under a claim of right, with the knowledge of the owner, and not with his permission; that the plaintiff must have exercised some right, conflicting with that of the defendant, other and farther than the mere ordinary use of the window for the admission of light and air; that the use must work some wrong, or must deprive the defendant of some beneficial right; that the existence of the sill was a fact tending to show that the plaintiff claimed the use of the window adversely to the defendant, and proper for the jury to consider with the other evidence in the case; that, in considering the same, they might well take into view the position of the sill and the opportunities the defendant had of knowing of its existence; and, by way of illustration, stated that more weight might perhaps be due to the fact that such a sill existed, if it was near the ground in a frequent passageway and in full view, than if it was very high up in the fourth story of the plaintiff's house and over the defendant's roof."

The jury found a verdict for the defendant, and the plaintiff alleged exceptions.

J. G. King, for the plaintiff, cited *Lewis v. Price*, 2 Saund. 175, note; *Cross v. Lewis*, 2 B. & C. 686; *Moore v. Rawson*, 3 B. & C. 332; *Tyler v. Wilkinson*, 4 Mason, 402; *Hazard v*

Rogers v. Sawin.

Robinson, 3 Mason, 272; *Mahan v. Brown*, 13 Wend. 261; *Renshaw v. Bean*, 18 Ad. & El. N. R. 112; *Banks v. American Tract Society*, 4 Sandf. Ch. 464; *Robeson v. Pittenger*, 1 Green Ch. 57; *Manier v. Myers*, 4 B. Monr. 520; *McCready v. Thomson*, Dudley (S. C.) 131; *Gerber v. Grabel*, 16 Ill. 217; *Atkins v. Chilson*, 8 Met. 403; *St.* 1824, c. 52; Rev. Sts. c. 60, § 27, & commissioners' note; *St.* 1852, c. 144.

E. D. Sohler, for the defendant, cited 3 Kent Com. (6th ed.) 418; *Bury v. Pope*, Cro. Eliz. 118; *Parker v. Foote*, 19 Wend. 309; *Pierre v. Fernald*, 26 Maine, 436; *Myers v. Gemmel*, 10 Barb. 537; *Napier v. Bulwinkle*, 5 Rich. 311; *Ingraham v. Hutchinson*, 2 Conn. 584; *Gerber v. Grabel*, 16 Ill. 217; *Fifty Associates v. Tudor*, 6 Gray, 255; *Sargent v. Ballard*, 9 Pick. 251; *Daniel v. North*, 11 East, 371.

METCALF, J. It is enacted by *St.* 1852, c. 144, that "no person, who has erected or may erect any house or other building near the land of any other person, with windows overlooking such land of such other person, shall by mere continuance of such windows acquire any easements of light or air, so as to prevent such other person, and those claiming under him, from erecting any building on such land." The question in the present cases has, by this statute, ceased to be of practical importance in any future case. We shall therefore omit such a discussion of that question, as we might otherwise have deemed advisable.

By the English common law, as shown by the authorities cited by Mr. King, the open and uninterrupted use, by the plaintiff, of the window in question, for more than twenty years before the *St.* of 1852 took effect, constituted, or was at least *prima facie* evidence of, such an adverse possession and use thereof, as entitled him to an easement of light and air, and to an action for an interruption of such easement by the defendant; and this, upon the ground that such uninterrupted use and possession would warrant, if not require, a jury to find a grant from the defendant, or from those under whom he claims, of a right to such possession and use. Is this the common law of Massachusetts? We think not, and for the reasons given in the

 Bradford & another v. Stevens.

American decisions cited by Mr. Sohier, and the additional case of *Cherry v. Stein*, 11 Maryland, 23. The case of *Pierre v. Fernald*, 26 Maine, 436, satisfactorily answers the plaintiff's argument drawn from the Rev. Sta. c. 60, §§ 27, 28.

The short grounds of the decisions cited are, 1st. That the making of a window in one's building, on his own land, and overlooking the land of his neighbor, is no encroachment on his neighbor's rights, and therefore cannot be regarded as adverse to him: 2d. That the English doctrine is not applicable to the state of things in this country, and would, if applied, work mischievous consequences in our cities and villages. And we may add, that even by the English law, before St. 2 & 3 W. 4, c. 71, was passed, the defendant might lawfully have done in the city of London what he has done in Boston. *Hughes v. Keeme*, Calthrop, 41. *Anon.* Com. R. 273. *Truscott v. Wardens of Merchant Tailors' Co.* 11 Exch. 855. The plaintiff has no ground of exception to the instructions given to the jury.

*Exceptions overruled.**

RUFUS B. BRADFORD & another vs. ATHERTON H. STEVENS.

Under the St. of 1852, c. 322, § 14, intoxicating liquors might be sold by any person, though not himself the importer, in the original unbroken packages in which they were imported, and in quantities not less than those prescribed by the laws of the United States.

In a book of original entry, entries of sales, begun by another person, but finished and the quantities and prices entered by the clerk producing them, are admissible in evidence of the sales, although he has no independent recollection on the subject; and copies of these entries, made by another in a second book, and verified by the witness, are also admissible, in connection with the first book.

In an action in which an auditor's report had been produced in evidence by the plaintiff, the judge instructed the jury that the burden of proof was upon the plaintiff, and was not satisfied by the auditor's report; that this was *prima facie* evidence, but might be rebutted by the defendant; that, if not rebutted, the verdict should be for the plaintiff; but if on the whole testimony there was a preponderance of evidence in favor of the defendant, the verdict should be for him. *Held*, that the defendant had no ground of exception.

* See *Carrig v. Dee*, 14 Gray, 583; *Radcliff v. Mayor &c. of Brooklyn*, 4 Comst. 200; *Lampman v. Milks*, 21 N. Y. 511; *Haverstick v. Sipe*, 33 Penn. State R. 368; *Webb v. Bird*, 10 C. B. N. S. 285, 286, and 8 Jur. N. S. 671

Bradford & another v. Stevens.

ACTION OF CONTRACT upon an account annexed. The case was referred to an auditor, who allowed certain items of intoxicating liquors, not imported by the plaintiffs, but purchased by them of the importers in the original, unbroken packages, and in quantities not less than the laws of the United States prescribed; and sold by them to the defendant in this state, without any license, after the passage of the *St.* of 1852, c. 322, and before the passage of the *St.* of 1855, c. 215, in the same packages and condition in all respects in which they had been imported.

At the trial in the superior court of Suffolk at May term 1856, before *Nash, J.*, the plaintiffs offered the auditor's report in evidence. The defendant contended that the plaintiffs could not recover the price of these liquors. But the judge ruled otherwise.

A clerk of the plaintiffs testified before the auditor that he sold and delivered to the defendant several of the articles charged in the plaintiffs' account, and at the same time made entries of their weights and measures in a book kept for that purpose, which he produced, and which contained marks denoting their delivery; that he knew his entries to have been accurately and truly made; but had no recollection, independently of the book, of the times of sale, or the quantities and prices of the articles sold. He also testified that in one instance, in his absence, the defendant's name was entered on the same book as having ordered certain articles; that he took the book and put up the articles, and entered their weights and measures upon the book; that those articles with their weights and measures were transferred, but not by the witness, from that book into the plaintiffs' day book to the debit of the defendant; and after their entry in the day book the witness delivered those articles to the defendant, and made a mark against them on the day book indicating such delivery.

The defendant objected to the admission of the clerk's testimony and the books, and of the auditor's report founded thereon, because the clerk had no independent recollection of the facts; because the book was not the plaintiffs' book of original entry; and because the entries of one transaction were made by an-

other clerk. But the judge, upon examination of the two books was satisfied as matter of fact that the first book was the plaintiffs' book of original entries of charges, and that in the instance last mentioned the entries, although begun in the handwriting of another person, were finished, and the quantities, prices, weights and measures entered, by the witness; and was of opinion that the entries were therefore substantially made by him, and that these entries having afterwards been copied into the day book by another clerk, and certain marks, called "delivery marks," affixed to them by the witness, that book was also admissible in connection with the first book.

The judge further instructed the jury that the burden of proof was upon the plaintiffs and was not satisfied by the auditor's report which had been produced in evidence; that this was *prima facie* evidence of the plaintiffs' claim, but might be rebutted by evidence adduced by the defendant; that if not rebutted, the verdict should be for the plaintiffs; and that if on the whole testimony there was a preponderance of evidence in favor of the defendant, the verdict should be for him.

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

E. Ripley, for the defendant.

G. H. Preston, for the plaintiffs.

BIGELOW, J. The clear implication of *St.* 1852, c. 322, § 14, is, that liquors imported regularly under the laws of the United States, and contained in the original packages, are not intended to be included within the prohibition and restraints enacted in that statute. The defendant was therefore liable for the price of those articles which were proved to have been in the original and unbroken packages in which they were imported, in quantities not less than those prescribed by the laws of the United States. The "owner and possessor" of such liquors, and not the importer only, is entitled to the immunity contemplated by the provisions of that section of the statute. It is otherwise under the *St.* of 1855, c. 215, which, by § 2, exempts from the penalties therein provided the importer of foreign liquors only, and not those holding the original package by purchase under him.

Winship & another v. Neale.

Upon the facts found by the court concerning the books used before the auditor, we think they were properly admitted in evidence; and that the report of the auditor was submitted to the jury with appropriate comments, to which no valid objection can be taken.

Exceptions overruled.

HENRY A. WINSHIP & another *vs.* ALONZO F. NEALE.

It is no ground of exception, that a party was allowed to ask a counsellor at law, on cross-examination, whether he had not filed interrogatories to him in behalf of the other party, and obtained a continuance of the action at the last term, and refused a continuance at this term, because the parties themselves would be made competent witnesses by statute before the next term.

An action of tort for taking and carrying away and converting to the defendant's use goods of the plaintiff cannot be maintained without proof of the plaintiff's possession, or right to an immediate possession.

ACTION OF TORT. The declaration alleged that "the defendant took and carried away the following described goods, the property of the plaintiffs, and converted them to his own use, all of which being against the plaintiffs' will and consent." A schedule of the property was annexed to the declaration.

At the trial in the superior court of Suffolk at May term 1856, before *Huntington, J.*, the plaintiffs introduced evidence tending to show that the goods were theirs, and had been consigned by them to John G. Haley, and taken by the defendant as a deputy sheriff on mesne process against Haley.

A counsellor at law, and former counsel for the defendant, was permitted, against the plaintiffs' objection, to testify; and upon cross-examination, the plaintiffs, in order to show the state of feeling and circumstances under which he testified, were allowed to ask him whether he had not filed interrogatories to the plaintiffs, and obtained a continuance of the case at the last term, and refused a continuance at the present term, after ascertaining what the plaintiffs' witnesses would testify upon a point testified of by him, solely because the plaintiffs themselves would be competent witnesses at the next term.

The defendant's counsel contended that "the plaintiffs had not, at the time of taking by the defendant, the possession of the articles sued for, nor the right to immediate possession and could not therefore, if the jury found such to be the fact, upon the pleadings as they stood, maintain this action. But the court instructed the jury that "although such was the law before the new practice act, it was not so now; and that it was not necessary for the plaintiffs to have actual possession, or the right to immediate possession, if the jury were satisfied that they were the owners at the time of the taking; but that the jury would deduct the value of the use, during the time they were not in possession, from the value at the time of the taking." The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

A. A. Ranney, for the defendant.

D. H. Mason, for the plaintiffs.

BIGELOW, J. 1. The extent to which the cross-examination of the witness should be carried was within the discretion of the judge who presided at the trial, and no exception lies to the mode of its exercise.

2. But the ruling of the court was erroneous in one particular. The cause of action set out in the declaration was either in the nature of trespass for wrongfully taking goods belonging to the plaintiffs, or of trover for converting them. In either case, it was necessary to show possession, or a right to immediate possession; otherwise, the evidence would fail to support the essential allegations in the declaration. The practice act makes no change in the rules of evidence applicable to the various causes of action comprehended under the general designation of actions of tort. *Robinson v. Austin*, 2 Gray, 564. The ruling of the court would have been correct, if the declaration had been for the wrongful act of the defendant in depriving the plaintiffs of their reversionary right or ownership in the property, subject to the special right or interest of Haley therein; but it was erroneous as applied to the cause of action set out in the declaration.

Exceptions sustained.

Boston and Maine Railroad v. Bartlett & another.

**BOSTON AND MAINE RAILROAD vs. JOSEPH H BARTLETT &
another.**

Specific performance of an agreement to convey land to a railroad corporation will not be decreed on a bill in equity filed by them more than three years after the other party has refused to perform it, and after they have located their road over other land including but a small portion of this, and after this land has greatly increased in value, without any steps taken by the corporation meantime to enforce the agreement.

BILL IN EQUITY, filed June 13th 1847, for the specific performance of the following agreement, signed by the defendants, and renewed by them in writing on the 30th of April 1844 for thirty days: "To the President and Directors of the Boston and Maine Railroad. Gentlemen, We the undersigned being the owners of a lot of land on the Mill Creek, we do hereby agree to sell the same to you or your representatives, for the sum of twenty thousand dollars, if taken within thirty days from date. Boston, April 1st 1844."

The plaintiffs on the 29th of May 1844 orally accepted the proposition, tendered the purchase money to the defendants, and requested a conveyance; but the defendants, in consequence of a dispute, which had arisen between the parties, whether the buildings upon the land were included in the agreement, refused to execute a conveyance of the land or to perform the contract.

The plaintiffs afterwards located their road, and included in the location a small portion of this land; and on the 7th of June 1847 the defendants petitioned the mayor and aldermen of Boston to assess damages for the land so taken.

The defendants introduced testimony that the land greatly increased in value between the 29th of May 1844 and the 13th of June 1847, in consequence of the construction of the railroads of the plaintiffs and the Fitchburg Railroad Corporation, and of a great fire which destroyed many old buildings in that neighborhood.

The case was argued upon the bill, answer and proofs, from which it appeared to be as above stated.

Boston and Maine Railroad v. Bartlett & another.

R. Choate & C. P. Judd, for the plaintiffs. The plaintiffs are entitled to a specific performance. It is admitted that the contract is certain and definite, fair and reasonable, and that the plaintiffs have made a sufficient offer to perform it on their part.

The plaintiffs have not abandoned the contract. *Remington v. Irwin*, 14 Penn. State R. 143. *Tiernon v. Roland*, 15 Penn. State R. 441. *Reynolds v. Nelson*, Mad. & Geld. 18. *Robinson v. Page*, 3 Russ. 119.

The delay in bringing the bill was no abandonment. It was filed as soon as the defendants filed their petition for damages. In this respect the case falls directly within *Western Railroad v. Babcock*, 6 Met. 346. Rise in value of the land is very difficult to be established, and there is no case in which this of itself has been deemed ground for defeating such a bill. See 6 Met. 357. And the rise is due to acts which were in contemplation of the parties at the time of the agreement.

B. R. Curtis & H. C. Hutchins, (*J. P. Healy* with them,) for the defendants.

BY THE COURT. A bill for the specific performance of a contract cannot be maintained as matter of strict right in every case in which a contract, valid in law, has been broken. It is an application to the discretion of the court, to its judicial discretion, guided by established principles. Any delay which shows that the party has not used reasonable diligence in applying for the aid of a court of equity will lead the court to refuse specific performance. 1 Sugd. Vend. (11th ed.) 235, 288. *Millward v. Thanet*, 5 Ves. 720 note. *Southcomb v. Exeter*, 6 Hare, 219-224, & note, & cases cited.

When this case was before us upon a demurrer to the bill, the only ground upon which the defendants insisted was, that their agreement was without consideration; and that was held to be no sufficient objection to the maintenance of the bill. 3 Cush. 224. But the case is now more fully exhibited to the court, and shows that the plaintiffs have been guilty of great laches. The contract for the sale of the land was made in April 1844. The plaintiffs performed their part of the contract on the 29th of May of the same year, and the defendants then dis

Boston and Maine Railroad v. Bartlett & another.

tinctly and absolutely refused to perform it on their part. No bill was filed for more than three years after the final refusal of the defendants to perform the contract, and this long delay in applying for the enforcement of the contract is left by the plaintiffs entirely unexplained. These facts would of themselves make us hesitate to give the plaintiffs the equitable relief which they seek. *Walker v. Jeffreys*, 1 Hare, 348, & cases cited. *Rogers v. Saunders*, 16 Maine, 92.

But there are other circumstances which tend to show that it would be inequitable to grant the relief asked for. The fact that the land which was the subject of the contract had greatly increased in value after the refusal to perform the contract and before the filing of this bill is entitled to some weight. *Holt v. Rogers*, 8 Pet. 434. The plaintiffs, having signed no agreement, could never have been compelled by the defendants to take the land. *Jacobs v. Peterborough & Shirley Railroad*, 8 Cush. 223. If the plaintiffs had themselves brought their action at law, the limit of their damages would have been the difference between the contract price and the value of the land at the time of the breach. *Old Colony Railroad v. Evans*, 6 Gray, 25. The location of the plaintiffs' road over a small portion only of this land, under the power conferred upon them by their charter, also indicated their intention to abandon this contract, or at least does not exhibit any intention to rely upon it. In the case of *Western Railroad v. Babcock*, 6 Met. 346, cited by the plaintiffs, there never had been any doubt that the plaintiffs intended to rely on the agreement, and they had located and constructed their railroad accordingly.

Having thus by their acts and laches for three years induced the other party to suppose that they have abandoned this contract, it is too late to apply to this court to enforce it.

Bill dismissed, without costs.

BLACK RIVER SAVINGS BANK *vs.* JOHN F. EDWARDS.SAME *vs.* SAME.SAME *vs.* SAME.

In an action upon a promissory note, the consideration of which was denied by the defendant, the judge instructed the jury that the burden was on the plaintiff to establish a consideration, and did not shift upon the defendant; that the note, containing the words "value received," in law imported a consideration, and upon the evidence of the note itself the plaintiff would be entitled to recover, unless there was some other evidence to affect it; yet the burden was upon the plaintiff to satisfy the jury upon all the evidence and by the preponderance of evidence that there was a consideration; that if the jury could not say upon all the evidence whether the testimony introduced was true, or so much was true as to affect the credit to be given to the note, the note would enable the plaintiff to recover; and that if the defendant did not himself receive the consideration, the note was still *prima facie* evidence of a consideration. *Held*, that the defendant had no ground of exception.

In an action by a corporation upon a promissory note payable to them and received by their treasurer, the judge refused to instruct the jury that to constitute a consideration it must be shown that the defendant had some value therefor, or that the plaintiffs, at the time of making it, intentionally, and as the consideration of the note, and at the defendant's request, agreed to do or did some act believed to be prejudicial to themselves; and also refused to instruct the jury that, as the plaintiffs adopted the note, they adopted it in all respects, according to the understanding and agreement of their treasurer and the defendant, and affected by the knowledge of all the facts known to them, and if as between them it was without value and for the accommodation of the plaintiffs, then, whatever uses their treasurer made or intended to make of it, the plaintiffs could not recover; and instructed the jury that if the plaintiffs received some prejudice, at the request or procurement of the defendant, it was a sufficient consideration; and that if the defendant and the treasurer knew that the object of the note was to deceive the plaintiffs, or to obtain money for the treasurer from them, that was enough to create a consideration, if the money was obtained upon it accordingly from the plaintiffs. *Held*, that the defendant had no ground of exception.

In an action upon a promissory note payable to a bank, the jury were instructed that if no money was had by the defendant on the note, and yet it was given by him to the plaintiffs' treasurer to aid him in getting money from the bank, and in concealing the condition of the bank, or to aid in any illegal transaction, or with reasonable cause to know that it would be so illegally used, and the money was accordingly obtained by the treasurer from the bank, the defendant would be estopped, because this would constitute no defence to the note, he being estopped to allege his own fraud. *Held*, that upon the facts supposed there would be no defence; and that the statement that the defendant would be estopped was immaterial.

A judgment for the plaintiff in an action to recover an instalment of interest on a promissory note, in defence to which want of consideration is relied on, is conclusive evidence of consideration in a subsequent action between the same parties to recover the principal of the note.

ACTIONS OF CONTRACT upon the following note: "Boston, Mass. October 1, 1853. \$14,000. For value received I promise

Black River Savings Bank v. Edwards.

to pay to the Black River Savings Bank or order fourteen thousand dollars, as follows: four thousand dollars in two years from date, and ten thousand dollars in three years from date, with interest at the rate of six per cent. per annum, payable on the first day of April and October of each year until paid, having deposited with said bank, as collateral security, twenty thousand dollars in the second mortgage bonds of the Ogdensburg Railroad, with interest coupons attached thereto, with full authority to sell the same on the nonpayment of principal or interest according to the tenor of the above note.

“John F. Edwards.”

The *first* action was brought to recover the interest from October 1st 1854 to April 1st 1855, and was tried in the superior court of Suffolk at September term 1856, before *Nelson*, C. J.

The defendant admitted the making of the note, but alleged that it was made without consideration, at the request and for the accommodation of the plaintiffs. The plaintiffs, having produced the note, and proved their own corporate existence, rested their case.

The defendant then called a broker, who testified that between October 8th 1852 and April 12th 1853 he purchased in Boston for and at the request of Daniel A. Heald, who was at that time the treasurer and secretary of the plaintiffs, the mortgage bonds described in the note in suit; that the defendant had nothing to do with giving the orders or making the payments for these bonds, and he never knew the defendant in any way in the transactions.

Heald and the defendant testified that the defendant, who was Heald's uncle, had no consideration for the note, and no interest in the bonds.

It appeared from the testimony of Heald and other witnesses, that the note in suit was placed in the Savings Bank to represent a loan of \$14,000 of the deposit of the bank; was so entered upon the books of the bank; and was so taken and received by the finance committee, trustees and other officers of the bank, and was so constantly represented by Heald to the bank and its depositors, and so held by the bank and its offi-

cers; and that deposits were made upon those representations and facts.

But Heald testified that this was not the truth of the case, but that the note was obtained by him in behalf and for the accommodation of the bank, and the bonds were previously purchased for the bank, with its money, and the note placed in the bank with the bonds, to give the transaction the form and semblance of a loan; that his object in procuring the note was, that the bank might not appear to be holding such an amount of bonds, except as collateral; that he thought it a safe and good investment for the bank; but did not wish that the trustees, and through them, the public, should know it. This testimony of Heald was contradicted by evidence of his own entries and declarations and official statements under oath.

Edwards testified that he signed the note at the request of Heald, without any explanation, except this remark made to him by Heald some months previously, "We may want to use your name for a short time;" and stated on cross-examination, "that when he gave the note, he did not know or think of, and that he did not now know or think of, and could not suggest, any lawful or honest purpose for which the note was wanted, or to which it could be applied, if not given to the bank for a loan of money; but that he did not know or think of any dishonest or unlawful purpose to which it was to be applied."

The plaintiffs controverted the credibility of the defendant and Heald; and the questions of their credibility, and of the effect of their testimony, were submitted to the jury with the other evidence.

The defendant's counsel prayed the court to give the following instructions to the jury:

1st. "To recover on the note in suit, the plaintiffs must prove that it was given upon a consideration good and sufficient in law; on this point the burden of proof is upon the plaintiffs; and unless they have, by the weight and preponderance of evidence, established such consideration, they cannot maintain their action."

2d "To constitute such consideration, it must be shown that

Black River Savings Bank v. Edwards.

the defendant had some value therefor, as money lent him, or the like; something of value, and agreed by the parties to be and to be deemed and taken as of value; or that the plaintiffs, at the time of making it, intentionally, and as the consideration of the note, and at the defendant's request, agreed to do or did some act believed to be prejudicial to themselves."

3d. "As the plaintiffs adopt the note, they adopt it in all respects, according to the understanding and agreement of Heald and the defendant, and affected by knowledge of all facts known to them; and if, as between them, it was without value, and for the accommodation of the bank, then, whatever uses Heald made or intended to make thereof, the plaintiffs cannot recover."

4th. "To establish a consideration, upon the ground that the note was obtained or used by Heald to procure a loan from the bank, or to procure any other favor, benefit or advantage therefrom, it must be shown, that the defendant intended to give the note to Heald for the purpose of enabling him in his individual capacity, or had reasonable cause to believe, that he would use the note in his individual capacity to procure such loan or other favor, benefit and advantage; and also that, relying upon the said note, the bank did make to Heald such loan, or extended to him such favor, benefit or advantage."

5th. "The burden is upon the plaintiffs to prove some certain and particular consideration for the note; and unless they point out and establish, by the weight of the whole evidence, some such certain and particular consideration, they do not prove a valid note; and they do not prove a note valid beyond the extent of such established, certain and particular consideration."

6th. "If the consideration relied upon is money lent to the defendant, the consideration is good only to the extent of money proved to be so loaned; if it is money lent on the note by the bank to Heald, on the defendant's request, and within the conditions of the prayers aforesaid, it is good only to the extent of money proved to be so loaned to Heald; if the consideration is prejudice to the bank, arising from the defendant's intentionally

assisting Heald to conceal true facts from the bank, it is good only to the extent of the damage proved to be caused by such prejudice; and the principal of the note, if the note is good to any extent, being ascertained, interest is to be cast accordingly, on that basis."

The judge instructed the jury as follows: 1st. "The burden of proof is on the plaintiffs to establish a consideration, and the burden does not shift from them to the defendant; the note, containing the words 'value received,' in law imports a consideration; and upon the evidence of the note itself, the plaintiffs are entitled to a verdict, unless there is some other evidence to affect it; the note, being produced, is *prima facie* evidence of a consideration; yet the burden is upon the plaintiffs to satisfy the jury, upon all the evidence, and by the preponderance of the evidence, that there was a consideration."

2d. "If the jury take the stories of the two witnesses, Edwards and Heald, or either of them, as true, the defence is wholly made out; but the jury are to consider all the facts and matters in evidence, and all the statements of those two witnesses on cross-examination; and if the jury are then in doubt upon these stories, and cannot say, upon all the evidence, that they were true, or so much was true as to affect the credit to be given to the notes, the note will enable the plaintiffs to recover."

3d. "In regard to the law of consideration, the law requires a valuable consideration; the gift of a note is not enough; nor is a mere moral obligation; it must be some benefit to the defendant, as money or the like; or some detriment, loss or prejudice to the plaintiff, as the forbearance of a right, &c., incurred by that party, at the defendant's request. The plaintiffs must satisfy the jury that some loss, trouble or prejudice has been suffered by the bank, at the request or by the procurement of the defendant."

4th. "Another view is: If no money was had by the defendant on the note, and yet it is proved that it was given by the defendant to Heald, to aid him in getting money from the bank and in concealing the condition of the bank, or to aid in any illegal transaction, and the money was accordingly obtained

Black River Savings Bank v. Edwards.

upon it from the bank by Heald, then the defendant is estopped, because this will constitute no defence to the note, he being estopped from alleging his own baseness."

5th. "Also if the defendant, not receiving any money for the note, gave it to Heald, not knowing that Heald wanted it for the purpose of concealing the condition of the bank, or of using it for any other illegal purpose, yet if he had reasonable cause to know it would be illegally used, and it was used by Heald to get money from the bank, he is estopped from alleging such fraud; and if the jury are satisfied that they were concerned together in this kind of enterprise, or if not, yet, if the defendant had reasonable cause to know that an illegal use was intended, the defendant is estopped from alleging such fraud, if money was procured upon it from the bank.

"If, as the plaintiffs contend, the bonds were purchased by Heald for himself, for his own purposes, and this note was obtained to enable Heald to get, replace or furnish money; and the note was placed in the bank for that purpose; and Edwards knew or had reasonable cause to believe this, the plaintiffs prove their case; and if fraud is alleged by the plaintiffs, the jury will presume against it, the law being, that he who alleges fraud must prove it."

The judge then proceeded to consider the defendant's prayers for instructions. The first prayer he adopted. The second he qualified thus: "I have instructed you, and repeat, that any prejudice caused by the parties to the plaintiffs constitutes a consideration to support the note; and that if the plaintiffs did receive some prejudice, at the request or procurement of the defendant, for which the note was given, it is enough." Upon the third prayer, he said to the jury: "I do not instruct you so; but instruct you, that if they knew that the object of the note was to deceive the bank, or to obtain money for Heald from the bank, then that is enough to create a consideration, if the money was obtained upon it accordingly from the bank." Upon the fourth prayer he said: "I repeat what I have said; if Heald wrongfully used the note, in fact to get a personal benefit, and the defendant gave it, intending to aid him, or having rea

Black River Savings Bank v. Edwards.

sonable cause to believe it was to be used for that purpose, then the note going into the bank and representing property of the bank gone somewhere, this would make a sufficient consideration." The fifth instruction prayed for was refused. The sixth was assented to by the plaintiffs, and therefore adopted by the court.

The defendant's counsel then requested the court to instruct the jury, "that if they believed, upon the evidence, that Edwards himself did not receive any money or other value for the note, then the note no longer imported, and was no longer *prima facie* evidence of a consideration; but that the plaintiffs must then show affirmatively, by other evidence than the note, that some prejudice or loss was sustained by the plaintiffs, for which the note was given." But the court refused so to rule; and instructed the jury, "that the note was *prima facie* evidence of a consideration; and that showing that one species of consideration was not the one did not alter this."

The jury returned a verdict for the plaintiffs; and to all the rulings and instructions of the judge, so far as they were inconsistent with and did not sanction the instructions prayed for, the defendant excepted.

R. Choate & E. A. Dana, for the defendant. 1. The second instruction in fact shifts the burden of proof as to consideration from the plaintiffs to the defendant, and thus modifies the previous ruling on that point, and overrules the defendant's first prayer. That prayer, as well as the defendant's last one, should have been granted. *Powers v. Russell*, 13 Pick. 76. *Delano v. Bartlett*, 6 Cush. 364. *Brown v. King*, 5 Met. 180. *Burnham v. Allen*, 1 Gray, 501, 502. Byles on Bills, (5th ed.) 92. The court should also have instructed the jury as to the degree of "credit to be given to the notes," which is matter of law; and should have required proof of some particular consideration.

2. The third instruction, as a legal definition of consideration, was incomplete in itself, and insufficient for the purposes of this case, because, taken in connection with the defendant's second prayer and the ruling thereon, it omitted and excluded the element of intelligent consent or intention, on the part of the

promisee, to suffer some loss or prejudice. Chit. Con. (8th Amer. ed.) 9 & seq. If, for the purpose of making out such intelligent consent, it was necessary to find that Heald represented the bank, then he must be taken as the proper representative of the bank in the whole transaction, and the defendant's third prayer should have been granted without qualification.

3. The fourth instruction was erroneous, and founded upon a misconception of the defence, which was want of consideration, and not fraud. *Wearse v. Peirce*, 24 Pick. 145. Upon the hypothesis presented in this instruction, the consideration set up by the plaintiffs was in itself illegal, and the note therefore void. Byles on Bills, 103. And the instruction as to estoppel was clearly wrong; for the doctrine of estoppel was not applicable to the case presented. *Dewey v. Field*, 4 Met. 385. *Heane v. Rogers*, 9 B. & C. 577. *Jackson v. Pixley*, 9 Cush. 490. *Merriam v. Cunningham*, 11 Cush. 40. *Agricultural Bank v. Robinson*, 24 Maine, 274. Similar objections apply to the fifth instruction.

E. R. Hoar & A. A. Ranney, for the plaintiffs.

BY THE COURT. 1. The instructions of the court upon the burden of proof and the evidence of consideration were correct. *Delano v. Bartlett*, 6 Cush. 364. The degree of credit to be given to the note is not matter of law, except so far that it is sufficient of itself, in the absence of any other evidence, to sustain the action; but its degree of credit, as compared with other evidence that may conflict with it, is for the jury. The judge correctly ruled that showing that the defendant had not himself received the consideration would not affect this rule; and rightly refused to instruct the jury that the plaintiffs must prove "some certain and particular consideration."

2. The plaintiffs did not seek to recover except upon proof of money received from them by the defendant or Heald upon the note, nor did any of the instructions of the judge authorize the jury to find a verdict for the plaintiffs without proof of such a consideration. The second of the defendant's prayers for instructions was rightly overruled; because an advance of money to a person to whom the defendant had given the note

Black River Savings Bank v. Edwards.

with power to use it would be a sufficient consideration, and would come under the head of prejudice to the plaintiffs, though nothing had been received by the defendant. The only intelligent consent required of the plaintiff corporation was the consent of their agent Heald. The adoption of a note obtained by an agent within his authority does not include the adoption of a fraudulent agreement or understanding between the agent and the other party beyond the line of the agent's authority.

3. The fourth and fifth instructions given were, in substance and effect, that if no money was received by the defendant on the note, yet if it was given by him to Heald to aid him in illegally getting money from the bank and concealing the condition of the bank, or with reasonable cause to know that such was Heald's purpose, and Heald obtained the money accordingly, the defence could not be maintained. This instruction required the plaintiffs to prove that money was actually obtained from them upon the note. That was of itself a sufficient consideration, which entitled the plaintiffs to recover. The further statements of the judge, that the defendant would be estopped to allege his own baseness or fraud, were entirely immaterial.

Exceptions overruled.

The *second* action was brought to recover the interest from April 1st 1855 to October 1st 1855 on the whole note, and the first instalment of four thousand dollars; and the *third* action was brought to recover the last instalment of ten thousand dollars, with interest thereon from October 1st 1855. The defendant, in his answer to each action, alleged that the note was made without consideration, at the plaintiffs' request, and for their accommodation. The plaintiffs filed replications, denying these allegations, and alleging that these questions had once been finally adjudicated between the same parties in the first action.

The second and third actions were tried together in this court at March term 1858 before *Bigelow, J.*, who reserved them for the judgment of the whole court upon the following report:

"The defendant admitted the signature; and the plaintiffs put in evidence the note in suit, and then offered the records of the

Black River Savings Bank v. Edwards.

court below in the former action, the defendant's bill of exceptions and the record of the decision of this court thereon, overruling said exceptions and entering judgment on the verdict for the plaintiffs.

"The plaintiffs contended that by this evidence it appeared that the subject matter of judicial controversy, on the pleadings in these two actions, was directly put in issue on the pleadings in the former action, submitted in evidence, and distinctly found by the jury; that the points now raised were directly included within the issues, and were essential to the verdict, and that judgment was therefore conclusive against the defendant, and precluded him from setting up again in these actions that the note was without consideration and made for the plaintiffs' accommodation.

"The defendant objected, and contended that said records were not admissible, and that said judgment was not conclusive, and did not preclude him from the same defence again; on the ground that the other suit was for interest only, and not for the same cause of action."

These cases were argued and decided at March term 1859.

Ranney, for the plaintiffs.

Choate & Dana, for the defendant. The judgment in the former action is neither conclusive nor admissible against the defendant in these, founded upon distinct and different promises, which may have been made upon distinct considerations, and which present different issues. The proof, which might be sufficient to charge the maker of a note for an instalment of interest falling due before the principal sum, might be wholly insufficient and irrelevant to charge him for the principal. A note might well be made merely for the purpose of securing for a stipulated time a series of payments corresponding to its maturing instalments of interest, and wholly without consideration as to its principal. Nothing can be pleaded by way of estoppel, or relied on as conclusive evidence, unless it has been put directly in issue and found by a former verdict. The rule cannot be extended to collateral facts, or to facts to be deduced by inference from the former finding of the jury. *Gilbert v. Thompson*, 9

Cush. 348. *Dutton v. Woodman*, 9 Cush. 261. *Bigelow v Winsor*, 1 Gray, 299. *Eastman v. Cooper*, 15 Pick. 276. *Richardson v. Boston*, 19 How. 268.

BIGELOW, J. The doctrine of *res judicata* as a bar to a subsequent action between the same parties, with its proper limitations and modifications at common law, as well as under the system of pleading now in force in this commonwealth, has been very clearly and fully stated in the recent case of *Sawyer v. Woodbury*, 7 Gray, 499. According to the principle there laid down, there can be no doubt that the former judgment rendered in the action between the same parties who are now litigating the present suits, and which is fully set forth in the plaintiffs' replications, is conclusive against the defendant on the several grounds of defence alleged in his answers.

The declaration in the former action set forth the same note as that now declared on, and alleged that there was due thereon the interest from October 1st 1854 to April 1st 1855. To that claim for interest the defendant pleaded that the note was made for the accommodation of the payees, and at their request. Upon the issue thus raised, it appears by the evidence now adduced by the plaintiffs, that testimony was offered at a former trial, and a verdict for the amount of the interest then due was found for the plaintiffs, on which judgment has since been rendered.

On examination of the answers in the present actions, it will be found that the same grounds of defence are alleged as were set up in the former action. It is true that, strictly speaking, the plaintiffs now sue on a different cause of action from that on which the former suit was brought; that is, they now claim to recover the whole principal due on the same note, and the interest thereon which has accrued and fallen due since the former action was commenced. But the question here is, not on the identity of the cause of action, but on the identity of the grounds of defence set up in the former action, with those relied on in answer to the present suits. These are precisely the same. The facts alleged, as showing payment of the principal and interest in those actions, are identical with those which were averred and

Barry v. Page & another.

attempted to be shown in defence to the claim for interest in the first action. The fact that the note was given as an accommodation note, for the use of the payee, and without any consideration, was distinctly put in issue in the former suit, and evidence in support and disproof of this fact was offered by both parties at the trial of that action. These averments of facts were precisely stated on one side and traversed on the other, and they were directly, not inferentially, found by the jury by the former verdict. They must therefore be taken as fixed facts between the parties for all purposes.

Judgment for the plaintiffs.

WILLIAM BARRY vs. LEMUEL PAGE & another.

The objection that a transitory action brought by a citizen of another state is not brought in the county of the defendant's residence or place of business, as required by *St. 1856, c. 70*, cannot be first taken after verdict.

A foreign principal may maintain an action in his own name for goods sold by his agent here, although no agency is disclosed at the time of the sale.

ACTION OF CONTRACT by a citizen of New York to recover the price of goods sold by his factors in Boston to the defendants.

At the trial in the superior court of Suffolk at January term 1858, it appeared that the goods were consigned by the plaintiff to the factors, and sold by them without mentioning their principal or indicating in any way that they were not their own, and that they subsequently presented bills for the goods in their own name.

The defendants asked the court to rule that the action should have been brought by the factors, and could not be maintained in the name of this plaintiff. But *Nash, J.* ruled that the action was rightly brought, a verdict was returned for the plaintiff, and the defendants alleged exceptions.

B. Dean, for the defendants, in support of the exceptions,

cited Story on Agency, §§ 288, 290, 400, 423, 448; Paley on Agency, 324, (3d Amer. ed.) note; *Merrick's estate*, 5 W. & S. 14.

He also moved in arrest of judgment, because, as appeared on the face of the writ, the plaintiff lived out of the State, and the defendants resided and had their place of business in the county of Middlesex; and therefore by *St.* 1856, c. 70, this action could only be brought and determined there.

C. P. Hinds & W. Tilton, for the plaintiff.

BIGELOW, J. 1. The objection to the jurisdiction of the court over the person of the defendant comes too late after he has pleaded to the merits and had a verdict rendered against him. *Brown v. Webber*, 6 Cush. 564. *Loomis v. Wadhams*, 8 Gray, 561.

2. As the contract of an agent is in law the contract of the principal, the latter may come forward and sue thereon, although at the time the contract was made the agent acted as and appeared to be the principal. There is a qualification of the rule, by which it is held that when a contract has been made for an undisclosed principal, who permits his agent to act as apparent principal in the transaction, the right of the former to intervene and bring suit in his own name is not allowed in any way to affect or impair the right of the other contracting party, but he will in such case be let in to all the equities, set-offs and other defences to which he would have been entitled, if the action had been brought in the name of the agent. But in the case at bar it does not appear that the defendant has any defence to the action, which he could have made if it had been brought by the agent. The objection is purely technical, and goes only to defeat the right of action by the principal, irrespectively of any meritorious answer to the suit.

It has been sometimes said that when a sale is made by a factor for a foreign principal, the latter cannot sue for the price. This supposed exception has been put on the ground that in such case the presumption at law is, that exclusive credit was given to the agent, and therefore the principal cannot be treated in any manner whatever as a party to the contract. But the later and better opinion is, that there is no such absolute pre-

 Bass v. Haverhill Mutual Fire Insurance Company.

assumption, and that a principal, whether foreign or domestic may sue to recover the price of goods sold by his factor, unless it is made affirmatively to appear that exclusive credit was given to the agent, by proof, other than the mere fact that the principal resided in another state or country. Story on Agency, § 420. Paley on Agency, (4th Amer. ed.) 324, note. *Taintor v Prendergast*, 3 Hill, 72. *Ilsey v. Merriam*, 7 Cush. 242. No fact appears in the exceptions to show any exclusive credit by which to take the present case out of the ordinary rule by which the principal can maintain an action in his own name.

Exceptions overruled

**JONATHAN BASS vs. HAVERHILL MUTUAL FIRE INSURANCE
COMPANY.**

The submission of a case in writing to the judgment of the superior court or court of common pleas upon evidence, "to be tried without the intervention of a jury," is a waiver of a trial by jury, pursuant to St. 1857, c. 267; and from the judgment thereon, if no exceptions are taken, no appeal lies.

ACTION OF CONTRACT upon a policy of insurance. In the superior court of Suffolk, the parties in writing "agreed that this case be submitted to the court, to be tried without the intervention of a jury," upon the policy and application and notice of loss, the plaintiff's evidences of title, and a deposition filed in the case; and "that the court may enter such judgment and for such amount as shall be thought correct." That court rendered judgment for the plaintiff, from which the defendants appealed. The plaintiff now moved to dismiss the appeal.

W. Brigham, for the plaintiff.

F. W. Hurd, for the defendants.

BY THE COURT. The agreement of the parties in this case is a waiver of a trial by jury, pursuant to St. 1857, c. 267. After such an agreement in the superior court or court of common pleas, if no exceptions are taken, no appeal lies to this court.

Appeal dismissed.

JOHN SHELTON & another vs. GARDNER BANKS.

A resolve of the executive council of the Commonwealth in 1786, establishing "a company of artillery" in a town, "agreeably to military law," did not make them a corporation.

Nonjoinder of a defendant in an action of contract can be pleaded in abatement only.

ACTION OF CONTRACT for military goods sold and delivered to the defendant.

At the trial in the superior court of Suffolk at January term 1857, the defendant offered evidence tending to show that he and another person were a committee duly appointed and empowered by the Waltham Artillery, a military corps, to purchase these goods for that company; that these goods were purchased by them as such committee, and used by the company; and that this company, with a change of its name and place, had been in existence ever since 1786, when it was organized under the following resolve of the executive council of the Commonwealth: "Advised, that a company of artillery be established at Watertown, agreeable to the military law."

It was admitted that the goods were delivered to the defendant, and that he was a member of the company and captain thereof. The defendant had not pleaded in abatement the nonjoinder of the other members of the company.

Nash, J. ruled that the fact that the goods were sold and delivered to the defendant as one of the committee of the company, of which company he was a member, was not a defence to the action. A verdict was rendered for the plaintiffs, and the defendant alleged exceptions.

A. V. Lynde, for the defendant. This company, having been formed before the passage of the act of congress of 1792, c. 29, or the militia laws of the Commonwealth, differs in organization from military companies formed since. It is in the nature of a corporation, and the company, and not a committee, much less a single member of the committee, is liable to this action.

A. E. Giles, for the plaintiffs.

Balch v. Hallet & others.

BY THE COURT. The resolve of 1786 was not an act of incorporation. The Waltham Artillery were a voluntary association of individuals, recognized by law, but having none of the attributes of a corporation. Of this association the defendant was a member, and liable jointly with his associates for their debts. The nonjoinder of the others as defendants, upon familiar principles of pleading, could be pleaded in abatement only.

Exceptions overruled, with double costs.

JOSEPH W. BALCH vs. GEORGE W. HALLET & others.

Under a will which declares that all moneys paid as and for dividends on shares in any corporation held by trustees under the will "shall be deemed and taken to be income and be appropriated as income according to the provisions of my will, excepting such dividends as shall be made and declared expressly as dividends of capital," *cestuis que trust* for life are entitled to dividends on shares in a wharf corporation, of profits arising from purchasing land, filling up flats, laying out streets, and erecting, leasing and selling warehouses, although in part consisting of proceeds from the sales of real estate of the corporation, if it does not appear that the capital or the value of the shares has been thereby diminished; and even, *it seems*, if it does so appear.

APPEAL from a decree of the judge of probate, allowing the account of the trustees under the will of George Hallet, in which they were credited with payments to *cestuis que trust* for life of dividends on stock in the Mercantile Wharf Corporation, incorporated by St. 1826, c. 13, with power to purchase a wharf estate in Boston, and "to sell their corporate property or any part thereof, and to lease, manage and improve, build, rebuild, pull down or alter the same; also to remove, construct, erect, repair or alter any buildings, wharf or wharves, docks, streets or passage ways, within said limits, according to their will and pleasure;" and who had, pursuant to their charter, purchased land, flats, wharves and stores, leased them, built other stores, filled up flats, made streets and sold some of the stores; using for these purposes moneys received from assessments on stock-

holders and from rents and sales of stores and lands. Dividends were from time to time made as dividends of the profits of the business of the corporation conducted as above stated. The shares in the corporation had increased in value during the trust. The charter and course of business of the corporation were well known to the testator, who devised the residue of his estate, after payment of debts, charges and legacies, in trust to pay the income thereof to his children for life, and afterwards to transfer the principal of each child to its issue, or in default of such issue to the testator's heirs at law; and further declared, "It is my will that all moneys which shall be paid as and for dividends on any investment that may be held by my trustees in any corporation or association shall be deemed and taken to be income, and be appropriated as income according to the provisions of my will; excepting such dividends as shall be made and declared expressly as dividends of capital."

The reason of appeal was, that upon the facts above stated the dividends must be deemed dividends of capital, and therefore be reinvested and retained by the trustees as part of the trust fund for the benefit of those interested in remainder.

This case was argued in writing by *T. B. Hall*, for the appellant and appellees.

BIGELOW, J. The only question arising on this appeal is the one stated in the reason filed by the appellant; and the decision of it turns on the right of the trustees to the allowance of a credit in their account rendered to the judge of probate of certain dividends received from the Mercantile Wharf Corporation, which they have paid over to certain *cestuis que trust* for life under the will of George Hallet deceased. The position of the appellants is this: that the sums thus credited cannot properly be regarded as income or profits on said stock, to which alone, by the terms of the will, the *cestuis que trust* are entitled; but that they are in their nature an extraordinary bonus or unusual addition to the ordinary dividends, or profits of said stock, arising from the sale of part of the corporate property, and ought to be deemed substituted capital, and added to the principal fund, for the benefit of those who will be entitled thereto on the death of the *cestuis que trust* for life.

Balch v. Hallet & others.

There can be no doubt of the general rule of law, applicable to trust estates, that when a dividend is declared and paid to trustees on funds in their hands derived from the sale of trust property, by which the principal fund is impaired or diminished, or where moneys are received as the proceeds of what are termed wasting securities, such as leasehold estates, which in progress of time will expire or perish or become of greatly diminished value, if the funds are held on a trust by which the income is to be paid for life to certain persons, and on their deaths the remainder is given to other persons, it will be the duty of the trustees to add such dividends or moneys to the principal fund so as to preserve it unimpaired for those entitled in remainder. *Paris v. Paris*, 10 Ves. 185. *Howe v. Dartmouth*, 7 Ves. 151. *Mills v. Mills*, 7 Sim. 509. Hill on Trustees (3d Amer. ed.) 386, 432.

But we do not see that, on the facts stated by the parties, this rule is at all applicable to the present case. There is nothing from which it appears that the dividends which the trustees have paid over to the *cestuis que trust* for life, and for which they claim credit in their account, are of a nature which in any degree impairs the value of the principal fund, or should cause them to be regarded as paid out of the capital stock of the corporation. The main purpose for which the corporation was established, from which these moneys were received, was to purchase a large quantity of real estate lying in that part of the city where wharf property and stores would, in the course of time, be much needed; and by filling up flats, making streets, erecting stores and carrying forward other improvements, to increase the value of the estate thus purchased and enlarged and improved, and thereby to obtain large gains and profits on the original investment or capital stock. It is in the nature of a trading corporation. Property invested in its capital stock is to be regarded in the same light as shares in an insurance, manufacturing or banking corporation. In the absence of any facts showing that the dividends in question were a part of the capital of the corporation, or that the payment of them essentially impaired or diminished the value of the shares, they are to be taken as part of the revenue or profits to which the *cestuis que trust* for life are entitled.

Shattuck v. Lawson.

The testator himself probably had in view property of the nature of these shares in the Mercantile Wharf Corporation, which he owned at the time of his decease, in making the provisions in his will, in which he directs that "all moneys which shall be paid as and for dividends on any investment that may be held by my trustees in any corporation or association shall be deemed and taken to be income, and be appropriated as income according to the provisions of my will; excepting such dividends as shall be made and declared expressly as dividends of capital."

Under this clause we are inclined to think the trustees would have been well authorized in making payments of these dividends, which were not declared as dividends of capital, to the *cestuis que trust* for life, even if it had been made to appear that they did encroach on the value of the principal fund.

Decree affirmed.

JOHN H. SHATTUCK vs. NICHOLS LAWSON.

A partner, who upon the dissolution of the partnership has received all the partnership assets, and agreed to apply them to the payment of the outstanding debts, for which they are sufficient, is not liable to an action at law by his copartner, for the amount of a partnership debt, which he has been obliged to pay, without showing a final settlement of the partnership business, or that there are no other debts outstanding.

An agreement of a partner with his copartner upon the dissolution of the partnership, to apply to the best of his judgment the partnership assets towards its outstanding debts, will not support a declaration alleging that the defendant agreed to pay all the outstanding debts of the partnership, and neglected and refused to do so. And the defendant may avail himself of this variance under an answer admitting the execution of the agreement (a copy of which is annexed to the declaration) and denying all the other allegations of the plaintiff.

ACTION OF CONTRACT. The plaintiff alleged that the defendant with him signed a certain promissory note, and the defendant promised to pay it at maturity, and received from him, as a consideration for paying it, all the assets of a partnership previously existing between them; yet the defendant neglected to pay the note or any part thereof, and the plaintiff was obliged to pay it.

In an additional count afterwards filed, it was alleged that

Shattuck v. Lawson.

the plaintiff and defendant, then and previously copartners, on the 10th of July 1852 dissolved their partnership, and the defendant purchased and received from the plaintiff all his interest in the partnership assets, and in consideration thereof made an agreement in writing (a copy of which was annexed, and is printed in the margin *) to pay all the outstanding debts of the partnership, among which was a certain promissory note; that the defendant neglected and refused to pay that note, and that the plaintiff was obliged to pay it, with costs.

The answer admitted the agreement, and averred that the defendant had kept and performed it, and denied the other allegations of the declaration.

At the trial in the superior court of Suffolk at March term 1856, the plaintiff stated that the agreement was made after the dissolution of the partnership and to close their business; and offered to prove, that under it the defendant had received all the assets of the partnership, which were more than sufficient to pay all their debts, yet had not applied the proceeds thereof to the payment of the debts, but had appropriated them to his own use; and the plaintiff, two years after the dissolution, was called upon to pay the promissory note mentioned in the declaration, and an action was brought against him upon it in Massachusetts, of which the defendant was notified, and refused to apply the proceeds of the assets in his hands to the payment of the note, and the plaintiff was obliged to pay it.

There had been no final settlement of the partnership concerns between the parties; but the plaintiff contended that "said agreement was of itself in law a final settlement of said copartnership between these parties, if the assets were fairly sufficient to pay the debts of said firm; as he claimed nothing from the assets over and above the amount of the debts."

The plaintiff further offered to prove that the action on the

* "New York, July 10th 1852. This is to certify that I, the undersigned, have received from John H. Shattuck all his right, title and interest in the stock, tools, and all bills outstanding due to the late firm of Lawson & Shattuck, shipwrights, caulkers and spar makers, at No. 272 South Street, which I agree to apply towards the payment of the debts outstanding against said firm to the best of my judgment.

Nichols Lawson."

note was commenced at the defendant's direction, and that the money thereby collected of the plaintiff came to the hands of the defendant.

The plaintiff contended, that as it was not alleged by the defendant that there were outstanding claims against the partnership, it could not be presumed that there were; and that the agreement set forth having been made after the dissolution of the copartnership, and the answer of the defendant having admitted that it was so made, and averred that it had been fully performed on his part, the plaintiff had a right to go to the jury on that issue.

Nelson, C. J. instructed the jury that the plaintiff could not maintain his action, a verdict was taken for the defendant, and the plaintiff alleged exceptions.

W. L. Burt, for the plaintiff, cited *Dickinson v. Granger*, 18 Pick. 315; *Bond v. Hays*, 12 Mass. 34; *Wilby v. Phinney*, 15 Mass. 116; *Fanning v. Chadwick*, 3 Pick. 420; *Brinley v. Kupper*, 6 Pick. 178; *Rockwell v. Wilder*, 4 Met. 556.

N. Morse, for the defendant.

BIGELOW, J. The facts proved at the trial did not show that there was any sum due to the plaintiff as a final balance after a settlement of all the business of the firm and the payment of all its debts. The evidence only tended to prove that the property of the partnership, which passed into the hands of the defendant, was sufficient to pay the debts due from the firm at the time of its dissolution; but it did not appear that there was any surplus left in the hands of the defendant, nor that his own claims on the assets of the firm had been paid or satisfied, nor that this was the only claim outstanding. Such proof was essential to enable the plaintiff to recover in an action at law against his copartner as upon a final settlement of the affairs of the copartnership. *Sikes v. Work*, 6 Gray, 433, & cases cited.

But the main reliance of the plaintiff at the trial seems to have been on his second count, in which he claims to recover the amount of a debt due from the firm, which he alleges that he was compelled to pay in violation of the agreement between himself and the defendant, made at the time of the dissolution

of the firm. The difficulty in maintaining the action on this count is, that it sets out no breach of the contract annexed to the declaration. The amended count seems to have been framed upon an entire misconception of the legal effect of the contract. It alleges that the defendant agreed to pay all the outstanding debts of the firm, and avers as a breach that the defendant neglected and refused to pay the note annexed to the declaration, and that the plaintiff was compelled to pay the same with costs. But the written contract contains no such agreement. The defendant did not undertake to pay all the debts of the firm. He only agreed to apply the partnership property and assets, which were placed in his hands, towards the payment of the outstanding debts of the firm, according to the best of his judgment. Beyond this he assumed no responsibility and incurred no liability to his copartner. There was therefore a fatal variance between the contract set out in the declaration and the written agreement offered in evidence. There was no averment that the defendant agreed to apply the partnership property in his hands towards the payment of the debts of the firm according to the best of his judgment, and no allegation of any breach of this stipulation. The evidence offered at the trial, that the property and assets of the firm in the hands of the defendant were sufficient, if properly applied, to pay all the debts of the firm, and that the defendant refused to apply them to that purpose, but appropriated them to his own use, did not sustain or correspond with any allegation contained in the declaration. The evidence would have been competent in support of a count properly framed on the contract, but had no tendency to prove the agreement as set out in the plaintiff's amended count.

Under the denial, contained in the answer, of each and every allegation in the amended declaration, except the execution of the written contract, the plaintiff was bound to prove the averments in his declaration; and it was competent for the defendant to object, not only that the written contract did not support the agreement as set out in the declaration, but that the evidence offered to prove a breach of the contract was inadmissible, because it had no tendency to show such a breach as the plaintiff had averred in his amended count

Exceptions overruled.

JESSE FOGG & another vs. JOHN PEW.

Conversations before the organization of a corporation, but in contemplation thereof, between persons who subsequently become officers and stockholders therein, are inadmissible against the corporation as evidence of an agreement to organize and transact business as a corporation without paying in the capital required by law; even if accompanied by evidence that the capital stock was afterwards pretended to be, but was not actually, paid in.

Neither the return which an insurance company are obliged by law to make to the secretary of the Commonwealth, nor a contract between them and their agent, is admissible in an action upon a premium note given to them, to show that the company fraudulently held themselves out as solvent, or that their officers were aware of their insolvency; without evidence that these facts were known to the maker of the note, or influenced him to procure the insurance.

Declarations of an agent of an insurance company, who has authority only to obtain applications for insurance and transmit them to the company, are inadmissible to show that the company represented that their capital stock was paid in, when it was not.

Fraudulent representations of the officers of an insurance company, concerning the solvency of the corporation and the payment of their capital stock, are no defence to a suit upon a premium note given to the company, unless these representations were held out at the time when the note was made, and for the purpose of obtaining it.

ACTION OF CONTRACT by the assignees in insolvency of the Metropolitan Fire and Marine Insurance Company, upon two promissory notes respectively made on the 5th and 21st of April 1854, and payable in nine months, for the premiums on two policies of insurance which terminated on the 30th of November 1854.

Answer, 1st. That the insurance company were insolvent at the time of issuing the policies, and continued so during the whole term of the risks; and that the officers of the company knew this, and intended to defraud the defendant, and did in fact deceive and defraud him; 2d. That the company became insolvent by the fraud of their officers, after making the policies; 3d. That no part of the capital stock of the company was ever paid in according to law; 4th. That the capital stock, if paid in, was never invested according to law.

At the trial in the superior court of Suffolk at November term 1856, before *Abbott, J.*, the defendant, for the purpose of showing that the capital stock of the insurance company was never paid in, was permitted, against the plaintiffs' objection, to intro-

Fogg & another v. Pew.

duce evidence of conversations between persons who afterwards became officers and stockholders in that corporation—both before their charter was obtained, but in contemplation thereof; and after the charter was obtained, but before the corporation was organized under it—as tending to show a concert and agreement among them (afterwards carried into effect) to organize the corporation, and transact business, without actually paying in the capital.

Evidence was offered tending to show that the capital stock was subscribed for and paid in by instalments before the date of the policies to the defendant.

The defendant introduced evidence tending to show that no part of the capital stock was actually paid in, so as to be within the control of the corporation, whatever might be the statement as to such payment on the books of the corporation; that said pretended payment was merely colorable and fraudulent, and made for the purpose of inducing the public to believe the capital was paid in, when in fact it was not; that the payments were made by the stockholders, the larger part in amount of whom were also directors, on the opening of the office of the company; that as soon as the money was counted by the secretary, by ascertaining the amounts on the wrappers inclosing the bills, it was taken possession of by the treasurer of the company, who was also president; and that it was immediately returned to the stockholders paying it, in pursuance of an arrangement for that purpose between said president and treasurer and said stockholders. The evidence also tended to show that none of the directors or officers of said company, except the president and treasurer, ever had any control of the money so paid in, or knew how it was used or invested; and that those directors of the company who resided in Boston had no knowledge of the transactions aforesaid, in reference to the payment of the stock, but supposed that it had been paid in. To this and all evidence in reference to the payment and investment of the capital stock of the company, the plaintiffs objected, upon the ground that, if there was fraud in this respect, it was the fraud of the president and treasurer, and not of the company, and the

defendant could not avail himself of the non-payment of the capital in defence to this action ; that he was precluded from it by taking the policies and giving the notes in suit to the corporation, and also by the fact that the plaintiffs were assignees under an assignment made in pursuance of the insolvent laws of this commonwealth, which was conclusive evidence of their right to sue ; and that the corporation were regularly authorized to transact business, and did in fact pay their contracts, till some time after the making of the defendant's policies. But the court admitted the evidence.

The defendant was also permitted, against like objection, to put in evidence the return made by the insurance company to the secretary of the Commonwealth, as required by law, in December 1853, and sworn to in March 1854, for the purpose of showing the condition of the corporation at that time, and that they held themselves out to the world as having their capital stock paid in.

The judge also, against the plaintiffs' objection, admitted in evidence, for the purpose of showing that the company were insolvent and that their managing officers knew it, a contract between the company and their agents in New York, (appointed "to take applications, countersign policies, and collect premiums, with authority to make the same binding upon this company,") in reference to the terms upon which insurances were to be made by the agents, and the compensation for their services.

Evidence was introduced that the policies were obtained through one Dolliver, an agent of the insurance company to receive applications for insurance only, and transmit them to the company, and who did receive and transmit the defendant's applications. The defendant, against the plaintiffs' objection, was allowed to testify that before making the applications to Dolliver he asked him what the capital stock of the company was, and whether it was paid in, and that Dolliver replied that it was all paid in and invested, and the defendant was induced by these representations to make the applications and take the policies.

The judge, among other instructions to the jury, gave the fol-

lowing: "If the Metropolitan Insurance Company, at the times of making the policies on which the notes in suit were given, were in fact insolvent, and did not possess the ability and means to indemnify against the losses which might happen on said policies, and this was known to the officers of said corporation, who made said contracts on their behalf, or any of them, and was not known to the defendant; and said officers did any acts or made any representations for the purpose of concealing their condition, and inducing the defendant to believe in their solvency and ability to perform their contracts, and so to insure with them: and he was deceived by said acts and representations, and induced by them to take the policies and give the notes in suit for the premiums; then he would not be liable for said notes, unless, after knowing said facts, he had affirmed the policies by claiming under them as valid contracts.

"In reference to the character and nature of the acts and representations to be proved, and the circumstances under which they must be made on the part of the company, it would be sufficient to show them done or made publicly or to a third person, if done or made for the purpose of defrauding and deceiving all who might deal with them, provided such acts or representations became known to the defendant, and he was deceived by them, and so induced to make the notes in suit.

"But mere insolvency on the part of the company, although known to its officers, without any acts done or representations made for the purpose of concealing or deceiving as to their true condition, would not be sufficient to defeat a recovery in this case, although the defendant might have believed in their solvency at the time of contracting with them, and although he would not have entered into such contracts but for such belief.

"If the capital of said company or any part thereof had never been paid in according to law, and the officers of said corporation had represented and held out to the world that it had been so paid in, for the purpose of inducing persons generally to insure with them, which representations came to the knowledge of the defendant, and he, relying on them, had been thereby induced to make the contracts of insurance with them, for which

he gave the premium notes in suit; the existence of such a state of facts would constitute a defence in this action, provided the defendant never affirmed the contracts after knowing the facts aforesaid, and the corporation were insolvent at the time of making said policies, or became so before the expiration of the risks insured against in the same.

"The burden of proof was on the defendant to establish that no part of said capital stock was ever paid in, and all the other propositions embraced in the aforesaid instructions."

The jury returned a verdict for the defendant, and the plaintiffs alleged exceptions.

W. R. P. Washburn & G. W. Smalley, for the plaintiffs.

R. H. Dana, Jr., for the defendant. 1. The evidence of conversations, before the organization of the corporation, but in contemplation of it, between those who afterwards became officers and stockholders in the corporation, and who were the contracting officers at the time of making these policies, was rightly admitted, in connection with evidence of the manner in which the pretence of paying in the capital was gone through with, (which necessarily involved the officers,) and with evidence that the plan was carried into effect in manner and form. It involved the same false representations which constituted the defence, and formed part of the chain of proof; and only carried back to an earlier period evidence of a fraudulent design, subsequently carried out. *Cook v. Moore*, 11 Cush. 213.

The evidence of the pretence of paying in capital was admitted only as a part of the proof that no capital was paid in, and that a false representation to the contrary was made to the defendant.

2. The return of the secretary of the company was admitted as part of the proof of false declarations, and available to the defendant, under the instructions given to the jury, only upon proof that he knew and relied upon them.

3. The contract of the company with their agents in New York was the act of the insurers, tending to show that they knew that they were insolvent.

4. The statements of Dolliver could not, under the instruc-

tions given, be regarded by the jury, unless he was an officer or agent authorized to contract and make statements, or was a third person through whom the false representations were made to the defendant by the insurers.

5. The instructions required the defendant to prove that the insurers were and continued insolvent, or failed to pay in any part of their capital, or failed to invest it according to law; and that they represented the contrary, knowing it to be untrue, for the purpose of procuring contracts of insurance, either to the defendant directly or through a third person, and that he knew of these representations and relied upon them. The ruling indeed went too far in requiring proof of actual fraudulent intent; which was not necessary, if the representations were known to be false, and were naturally calculated to mislead a person who had a right to rely upon them.

No evidence of anything subsequent to the date of the notes was admitted, unless as tending to prove a fact existing before that time.

BIGELOW, J. Several of the rulings, to which exceptions were taken in the course of the trial of this case, were erroneous.

1. Evidence of conversations between divers persons, which took place before the act incorporating the company of which the plaintiffs are assignees was passed, was clearly incompetent. The corporation certainly could not be bound by the declarations of persons, made before they had any existence, and the plaintiffs as assignees stood in the same position as the corporation. A party cannot be affected by any statements, unless they are shown to be made by him or by some one authorized to speak in his behalf. The fact that the persons whose declarations were admitted were subsequently officers or stockholders in the corporation did not show any adoption or ratification of these previous statements by the corporate body after its creation and organization. Nor was it even made to appear that they were known to those who constituted the majority of the stockholders of the corporation, and who took part in its establishment and organization. Under these circumstances, we are at loss to see on what possible ground such evidence could be held to be admissible.

2. The return made by the corporation to the secretary of the Commonwealth, in compliance with the provisions of the statutes, was irrelevant and immaterial to the issue before the jury, unless accompanied by further evidence that the defendant saw or knew of such statement, and was thereby deceived, and entered into contracts of insurance with the corporation, relying in some degree on the statements which it contained. The corporation were entitled to enforce contracts made by the defendant with them, notwithstanding their insolvency, unless he had been induced to enter into them by some fraudulent misrepresentations which were intended and allowed by the corporation to operate on his mind; and it was wholly immaterial that they had made false statements in their returns to the secretary, unless in some way they were brought home to the defendant, and were suffered to influence him in signing and delivering the notes in suit. *Alliance Mutual Ins. Co. v. Swift*, 10 Cush. 433.

3. The same reasons are applicable to the contract offered in evidence, between the corporation and their agents in New York. There was no evidence offered to show that the defendant had any knowledge of the existence of such a contract; and if he had known of it, we do not see that it tended to prove the fact of the insolvency of the corporation, for which purpose it was admitted. It was certainly very slight and remote evidence to prove the fact.

4. Evidence of the declarations of Dolliver was incompetent. He was a special agent only, with a limited authority to receive and transmit applications for insurance to the corporation. By virtue of such agency, he had no authority to make declarations concerning the condition of the company or the payment of their capital stock. The power of an agent to speak for his principal is confined strictly within the scope of his authority. 1 Greenl. Ev. § 113. Any statements concerning matters beyond this are hearsay and inadmissible.

5. The instructions to the jury were in one respect deficient in accuracy, and tended to mislead them. It was not a sufficient defence to the notes declared on, that the corporation had

Potter v. Irish.

at some previous time made false and fraudulent representations concerning their solvency and the condition of their capital stock, for the purpose of inducing persons generally to deal with them, unless such representations were held out at the time when the defendant gave the notes, and to induce him to give them. This qualification was omitted. As the case was left to the jury, they might have found a verdict for the defendant on the ground of false statements or inducements, although they were not shown to have been continued or authorized when the defendant entered into the contracts of insurance in consideration for which the notes were given. The corporation through its agents may have been guilty of falsehood and fraud to other persons at other times. But they were not to be held responsible therefor in this action, unless it was proved that the circumstances were such as to lead to the inference that such misrepresentations were intentionally allowed to operate on the mind of the defendant in inducing him to execute and deliver the notes on which the plaintiffs now seek to recover judgment.

Exceptions sustained.

JAMES A. POTTER vs. FRANCIS O. IRISH.

Under the U. S. St. of 1850, c. 27, requiring every mortgage or conveyance of any vessel or part of a vessel to "be recorded in the office of the collector of customs where such vessel is registered or enrolled," the record must be made in the district of the last registry and enrolment, though not the home port of the vessel; and a mortgage not so recorded conveys no title as against an attaching creditor of the mortgagor, although his attachment is not made until after the mortgagee has taken possession for breach of condition of his mortgage.

ACTION OF TORT against a deputy of the sheriff of Suffolk, for the taking on mesne process of one fourth part of the Barque O. J. Chaffee, as the property of N. (J.) Bourne.

At the trial in the superior court of Suffolk at January term 1857, before *Nash, J.*, there was evidence of these facts: The

barque was built at Camden in 1849, and enrolled for the coasting trade on the 22d of November 1849 in the office of the collector of customs of the Belfast District, in which Camden is situated, and described in her enrolment as of Camden, and has ever since borne Camden on her stern, but has never since been at Camden. Bourne then owned one quarter, and, together with the owners of two other quarters, resided at Camden. Upon successive changes of owners of those two other quarters, the barque received temporary registers: on the 12th of January 1850, at New Orleans; on the 9th of June 1851, at Rockland, Maine; and on the 9th of December 1851 at Boston; in all of which she was styled as of Camden. On the 18th of September 1855 Bourne executed to the plaintiff, who resides at Providence, R. I., a mortgage of his quarter part of the vessel, which was recorded in the custom house at Belfast, and for breach of condition of which the plaintiff took possession before the defendant's attachment.

The defendant contended that the mortgage to the plaintiff was not recorded in accordance with the U. S. St. of 1850, c. 27, § 1, and was therefore void as against the attaching creditor, who had no notice thereof. The judge directed a verdict for the defendant, and the plaintiff alleged exceptions.

R. H. Dana, Jr. for the plaintiff. The question is whether, under the U. S. St. of 1850, c. 27, requiring all bills of sale, mortgages, hypothecations and conveyances of any vessel, or part of any vessel, to be "recorded in the office of the collector of the customs where such vessel is registered and enrolled," Belfast or Boston was the proper place for recording the mortgage from Bourne to the plaintiff; the one being the place of her domicil and permanent registration, and the other the place of her last temporary register. The policy of the laws of the United States is that each vessel shall have a domicil for the purposes of revenue and of ascertaining title. *St.* 1792, c. 39, §§ 3, 11, 12, 1 Sts. at Large, 288, 292, 293. *St.* 1850, c. 27, §§ 1-5, 9 Sts. at Large, 440, 441. *Hays v. Pacific Mail Steamship*, 17 How. 596. Treasury Regulations of 1857, pp. 1-30. For the purpose of ascertaining titles and recording incumbrances

the balance of convenience and safety is greatly in favor of a rule that the place where the last permanent registration has been made need alone be looked to, rather than of a rule which would require a search for all possible temporary registrations. There is no question that the domicile of this vessel and her proper place of permanent registration were Camden. It will not be pretended that mortgages must be registered anew, under the act of 1850, on changes of domicile; still less on obtaining temporary registers away from home. *Brigham v. Weaver*, 6 Cush. 298. The temporary register does not vacate the permanent register, nor the temporary enrolment the permanent enrolment; but the permanent papers continue in force until the vessel returns to her port of permanent registration, and receives a new register or enrolment. *St.* 1792, c. 1, §§ 11. Treasury Regulations of 1857, c. 1, §§ 2, 4, 7; § 9, art. 47.

If the mortgage was not legally recorded, it was still valid as between the parties, as at common law; and the plaintiff had the legal title, with the right of possession at all times, which was made absolute by the breach of condition, and his taking possession; after which an attaching creditor of the mortgagor cannot set up want of record of the mortgage.

P. W. Chandler & G. O. Shattuck, for the defendant.

BIGELOW, J. We regret that we are called upon in this case to give a construction to an act of congress, in anticipation of any interpretation of its provisions by the supreme court of the United States, whose decision upon it would be paramount and final. But as the rights of the parties to this action depend on the construction of the language of the statute, we cannot avoid the duty of giving our views of its true exposition.

By the first section of the act of congress of 1850, c. 27, it is provided that no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of a vessel shall be valid, against any other person than the grantor or mortgagor and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance be recorded in the office of the collector of customs where such vessel is registered and enrolled. 9 U. S. Sts. at Large, 440. The plaintiff claims to hold one

fourth part of the vessel, which is the subject of controversy in the action, under a mortgage from the owner, recorded in the office of the collector of customs of Belfast, in the State of Maine. The defendant, on the other hand, having attached said one fourth on a writ against the mortgagor and owner, insists that the mortgage to the plaintiff is invalid against him, because there is no evidence of any actual notice to him of its existence, and it is not recorded in the office of the collector of the customs where the vessel was registered at the time the mortgage was made, in pursuance of the act of congress above cited. The real and only question at issue therefore is, whether, on the facts stated concerning the enrolment and registry of the vessel, the mortgage should have been recorded at the office of the collector in Belfast, where she was originally enrolled and where her owners at the time of such enrolment resided; or at the office of the collector in Boston, in which she was registered when the mortgage to the plaintiff was executed and delivered. This question can be determined only by referring to the various provisions of the laws of the United States, regulating the enrolment and registry of vessels, with a view to ascertain the place intended to be designated for the record of mortgages and other transfers of vessels by the statute of 1850.

As preliminary to this inquiry, and as essential to ascertain the true answer to be given to it, it is necessary to notice the purpose which congress had in view in enacting the provision requiring such mortgages and transfers to be put on record. Of this there can be no doubt. Its design was the same as that intended to be accomplished by all acts requiring a registry of deeds and other conveyances — to give notice to all persons interested of the true condition of the title, and to prevent innocent parties, like purchasers or creditors, from being injured or defrauded by the existence of prior transfers and incumbrances, of which they had no notice, and could obtain none, when they bought property, advanced money upon it, or gave credit to parties who were in possession and had the nominal title to it. Such being the manifest design of the statute, it is the duty of those who are called on to expound its provisions to give to

them such an interpretation as will more effectually carry out the intention of its framers. Indeed, no other rule of exposition can be safely adopted in construing a statute the terms of which are ambiguously expressed, and are open to two different constructions.

By the act of 1792, *c.* 39, § 3, 1 U. S. Sts. at Large, 287, it is provided that every vessel shall be registered by the collector of the district in which shall be comprehended the port to which she belongs at the time of her registry, which shall be deemed to be the port at or nearest to which the owner, if there be but one, or, if more than one, the husband or managing owner of such vessel usually resides. By § 11 of the same statute it is provided that when any citizen shall purchase or become the owner of any ship or vessel entitled to be registered, she being within a district other than the one in which he resides, she shall be entitled to be registered by the collector of the district where she may happen to be at the time of his becoming owner thereof; it being provided however, that the register thus obtained shall be delivered up to the collector of the district where the ship or vessel belongs, whenever she shall arrive at a port comprehended within such district, and thereupon the collector shall issue a new register in lieu of the one so surrendered. A similar provision is made by § 12, in case of a purchase of a ship or vessel by an agent or attorney acting in behalf of a citizen of the United States. If such ship or vessel is in a district more than fifty miles distant from the one comprehending the port where the vessel ought to be deemed to belong — that is, where her new owner or the ship's husband resides — the collector of the district where the vessel may be is authorized and required to issue a new register, which is to be surrendered in like manner as provided in § 11, when his ship or vessel shall arrive in the port where she belongs, and a new register is to be issued in lieu thereof by the collector of the district in which such port is situated. So by § 13, if the certificate of registry of a ship is lost, mislaid or destroyed, a new one may be issued by the collector of the district where she may first be after such loss or destruction; to be surrendered in like

manner as provided in previous sections, whenever the ship or vessel shall arrive in the port in which she belongs. And by § 14 it is provided that when any registered ship or vessel shall, in whole or in part, be sold or transferred to a citizen of the United States, or shall be altered in form or burden, she shall be registered anew in compliance with the foregoing provisions, that is, in the port where she may be at the time of such sale or alteration. A like provision is made by the U. S. St. of 1803, c. 18, § 3, in case of registered ships or vessels sold or transferred to citizens of the United States while without the limits thereof. In those cases, a new register is to be obtained from the collector of the district in which she shall first arrive after such sale or transfer within the limits of the United States. 2 U. S. Sts. at Large, 210.

Provisions of a similar character are made respecting the enrolment of vessels engaged in the coasting trade by the act of 1793, c. 46, with the following additional enactments: By §§ 7, 8, it is enacted that collectors may enrol and license any ship or vessel which has been registered, or register any ship or vessel which has been enrolled, on the surrender of the enrolment or license previously granted; and the exchanges thus authorized may be made by the collector of any district where the ship or vessel may happen to be, with a proviso that such register or enrolment shall be given up to the collector of the district where the ship or vessel belongs within ten days after her arrival in such district. 1 U. S. Sts. at Large, 305.

From these numerous provisions it is apparent that, while every ship or vessel of the United States has a home port, to which she legally belongs, or in which she has a domicile, it by no means follows that she is to be registered and enrolled at all times in the office of the collector of the district within which such home port is comprehended. When she is first built and is to be registered and enrolled in order to receive the document which is to give to her her national character, she is to be registered or enrolled in the district within which the port to which she belongs is included. So if, in the course of her voyages, she has occasion to change such original register or

enrolment, and again arrives at the port of her domicil, such substituted register or enrolment is to be then surrendered and a new one taken out. But in all other cases for which provision is made in the statutes above cited, her register or enrolment is not to be made and issued at such home port or district, but in that one where she may happen to be when, according to the provisions of law, it becomes necessary or expedient to surrender her previous register or enrolment and take out a new one. If, for instance, a ship or vessel, or any part of her, is sold and transferred, a new register or enrolment is to be taken out in the district where she may be at the time of such sale and transfer, and this new register or enrolment continues to be her only register or enrolment until she returns to the district in which the port to which she belongs is comprehended, unless she is previously again sold and transferred, in which case another new register or enrolment is to be taken out in the district where she may happen to be, to be exchanged in like manner when she arrives at the port of her domicil. The result of these provisions, in their practical working, is that a ship or vessel may and often does change her register or enrolment many times in the course of her voyages, and continues to sail for years without returning to the port to which she belongs, and without having a register or enrolment in the district in which such port is comprehended.

The case at bar furnishes a good illustration of the practical operation of the provisions of the statute. The vessel in controversy was originally enrolled in her home port for the coasting trade on the 22d of November 1849. On the 12th of January following, she being then at New Orleans, a register was there taken out. From that date to the time when the vessel was attached by the defendant on the 20th of February 1856, for upwards of six years, she has been registered in various ports; but during all this time she has never returned to Camden, the port to which she is said to belong, and has never been registered in the district within which that port is included.

Under such a system of registration and enrolment it would seem to be reasonable and in many cases necessary that, in

order to accomplish the great purpose which the statute requiring a record of mortgages and other conveyances of ships or vessels was intended to effect, the place of the record should be the district where the present existing register or enrolment of a ship or vessel is made. In no other way can a notice to all persons interested be made certain and effectual. A ship or vessel can have at the same time but one register or enrolment. It may be called either permanent or temporary ; but, whatever is its nature, it constitutes for the time being the only document which gives to the vessel her legal *status* as an American vessel. The certificate of such registry or enrolment is not only in the nature of a passport which she always carries with her to show her national character, but, in a certain sense, it is also a muniment of title, which, by § 14 of the statute already cited, is to be inserted at length in any bill of sale of the vessel or any part of her, in order to entitle a purchaser to a new register or enrolment. It is therefore to this document, that purchasers, creditors and other persons interested to inquire into title would naturally look, as indicating her ownership at the time it was issued ; and as it would always be readily accessible, it would afford an easy and certain means of ascertaining by an official certificate the place to which recourse should be had, in order to learn whether the ship or vessel is subject to any mortgage or hypothecation subsequent to its date.

This interpretation of the statute is not only consistent with its object and meets and satisfies it, so far as it is practicable to do so ; but it seems to be the only construction which harmonizes with the natural and ordinary meaning of its language. The requisition is, that the record shall be made "where such vessel is registered and enrolled." It certainly would not be a compliance with this provision to put a mortgage on record in a district where a ship or vessel is not and never has been either registered or enrolled. Yet such would be the result, if the construction of the statute is that such record is to be made in all cases in the district where the ship or vessel belongs, without regard to the fact that the registry or certificate of enrolment in that district may have been long previously surrendered, and

a substituted one taken out in a port where the vessel may have been, in compliance with the provisions of the statute already cited, and that in the mean time she has not returned to her port of domicile. We do not see how this conclusion can be avoided, unless it be said that a vessel may be registered or enrolled in two places at one and the same time. But for such a position we can see no warrant, either in the statute, or in the somewhat loose practice which has grown up under it in the course of nearly seventy years.

The construction for which the plaintiff contends, that the place of record under the statute is in all cases the district where the vessel belongs, is not merely unreasonable and inconsistent with the purpose and language of the statute; but in many cases a compliance with such a requisition would be wholly impracticable, and would make the statute inoperative. As has been already said, the requirement is clear and unequivocal that the record is to be made where the "ship or vessel is registered and enrolled." Now it not unfrequently happens that a ship is not and never has been registered or enrolled in the district to which she by law belongs. This may be so, not temporarily or for a brief time, but continuously and for many years. We have seen that in the case at bar the vessel in controversy had sailed for upwards of six years under a registry granted in another district than that to which she belonged, and although a registered vessel, she had never been registered in her home port.

But a stronger case than this often occurs. Take for example the case of a vessel which, after being built and duly registered or enrolled in the port to which she then belongs, is subsequently sold while in another port, within the limits of another district, to a citizen of the United States, whose residence is not in either of those two districts, but within the limits of a third. In such a case, the requisitions of the statute are clear and imperative, that the vessel is to be registered or enrolled anew in the district where she may happen to be at the time of such sale. She then ceases to have any legal registry or enrolment in the district to which she originally belonged. She has acquired none in the district where her owner or ship's husband

resides, because the statute makes no provision for granting any to her, until she arrives within the limits of such district. The only registry or enrolment she can have is in the district in which she is at the time of her sale and transfer. And such registry or enrolment may continue for a long time to be the only one to which she is entitled. During this period of time where is a mortgage, sale, pledge or hypothecation of such vessel to be recorded? Not in the district to which the vessel belonged before the sale, because she is no longer there legally registered or enrolled; nor in the district within which the new owner or ship's husband resides, because until she arrives there she is not entitled to registry or enrolment in such district. The record in such case can be made only in one place conformably to the statute, and that is in the port or district where she was at the time of the sale and transfer, and in which her new registry or enrolment is by law to be made. Such would be the necessary result in every case where there was a change of ownership of a ship or vessel in a district other than that to which she belonged, or where there was a change of register or enrolment elsewhere than in the home port in any of the cases provided by statute, until the ship or vessel in the course of her voyages should arrive within the limits of the district where the port to which she belonged was situated. This she might not do at all or only after the lapse of many years.

The conclusion seems to be unavoidable, that in a large class of cases the statute, if construed as requiring a record of mortgages or other conveyances in the district to which a vessel belongs, would be wholly ineffectual and inoperative. But no such result would follow if the provision is interpreted as requiring a record where the present existing registry or enrolment of a ship or vessel is made. Such a requisition can at all times be complied with. It is a received and indisputable rule of exposition, that when there are two interpretations of which the language of a statute is susceptible, that one must be adopted which will give full force and effect to its provisions in all cases coming within its purview, to the exclusion of that construction which would render its operation only imperfect and partial.

These views of the true interpretation of the statute under consideration derive some confirmation from the language used in the third section. It is there provided that the collector, when required, shall furnish any person a certificate of "the material facts of any existing bill of sale, mortgage, hypothecation or other incumbrance upon such vessel, recorded since the issuing of the last register or enrolment." 9 U. S. Sts. at Large, 441. This would seem to imply pretty strongly that the office whence the last register or enrolment was issued was the place intended for the record of such conveyances. Certainly such a provision would in many cases be inapplicable to the collector of the district where the vessel belonged. He would have no means of knowing when a vessel had last received her register or enrolment, if she had changed it, after leaving her home port, or had never been within the district to which she belonged, after her transfer to her present owners.

It was suggested by the counsel for the plaintiff that a register or enrolment taken out at a place other than in a district where a ship or vessel belonged was only "temporary," and that a "permanent" one could be had only in the port or district where a vessel may be said to be domiciled. We are aware that these words are in practice used in documents of this nature to designate the two kinds of registers or enrolments to which a vessel may be entitled. They were probably adopted as a matter of convenience to distinguish readily between the two, and also to remind the master or owner of the necessity of exchanging them when an exigency contemplated by the statute required it. But these terms are nowhere to be found in the enactments of congress, and as they were well known and in use when the *St.* of 1850, *c.* 27, was passed, it is reasonable to suppose that they would have been incorporated into it if it was intended that its provisions should be in any way affected or controlled by them.

It was also suggested that, as the register or enrolment of a vessel, whenever granted, always contained a statement of the port to which a vessel belonged, there would be no difficulty in ascertaining the place to which a purchaser or other person

interested should look to see whether she was subject to a mortgage or other incumbrance. But the answer to this suggestion is, that the register or certificate of enrolment does not necessarily indicate the port to which a vessel may belong at any given time. It will show, it is true, where it was at the time it was issued, but not necessarily afterwards. The place of residence of the owners or ship's husband may change subsequently to the time when the register or certificate of enrolment was issued, and thus alter the port to which the vessel would legally belong. But the register or enrolment might still continue the same for a long period — as in the case at bar for upwards of five years — during which it might afford no correct information of the port to which the vessel belonged, or where she would be registered or enrolled, if she had happened to have arrived within its limits.

We are led by these considerations to the conclusion that the mortgage under which the plaintiff claims to hold the vessel was not duly recorded. It was put on record at Belfast, the district within which she belonged, but where she had never been registered, because she had not been within the limits of that district since the time when the register under which she was sailing at the date of the mortgage was issued. It was not put on record at Boston, where her last register was issued, under which she had been sailing for upwards of five years.

No question is made by the counsel for the plaintiff of the validity of the *St. of 1850, c. 27*, or the constitutional authority of congress to enact it. He has assumed it to be a valid and binding enactment. Taking it to be so, it follows that the plaintiff cannot claim title under the mortgage; because the act of congress expressly provides that no sale, mortgage, hypothecation or conveyance of a vessel or a part of it shall be valid against any other person than the grantor or mortgagor and persons having actual notice of it, unless it is recorded in the place designated by the statute.

There was no evidence at the trial of any actual notice to the defendant of the existence of the mortgage; nor are we able to see that there was any evidence on which the jury could have found a verdict in favor of the plaintiff on any of the grounds urged in his behalf.

Exceptions overruled.

Cabot & others, Executors, v. Amory, Executor, & others.

**SAMUEL CABOT & others, Executors, vs. THOMAS C. AMORY,
Executor, & others.**

Merchandise was shipped under an agreement between the shippers and the shipowner that it should be carried around Cape Horn or elsewhere for a market, and the net proceeds, deducting charges and master's commission on sales, invested in specie or bullion and shipped to the United States or Canton; if to Canton, to be invested in such goods as the shippers might direct, to be shipped to Boston, subject to a deduction of the usual charges, and on their arrival in Boston to be sold by auction, and, after deducting from the net proceeds the original cost and all charges except premiums of insurance and interest on the money, "the residue or profits to be equally divided between the shipper and shipowner." The ship went around Cape Horn, and the master sold the cargo in Chili and Peru for specie, part of which was forcibly taken from him by the government of Chili, then at war with Spain; and, being unable for want of funds to proceed to China at once, traded along the coast, and afterwards went to Canton, invested the remaining proceeds of the outward cargo and other funds in a cargo for Peru, went to Peru, and there sold it for specie, part of which he remitted to Boston, where it was distributed among the shippers, and the residue with the brig were seized and appropriated by the Chilian government, who many years afterwards, under treaty with the United States, paid about two thirds of the cost of the original cargo, with interest from the time of seizure. *Held*, that the owner of the ship was not entitled to any portion of the money paid by Chili, although, including the interest, it exceeded the original cost of the goods; nor of the money sent home by the captain from Peru, without proof of the terms upon which the goods were shipped from Canton to Peru.

BILL IN EQUITY, in the nature of a bill of interpleader, filed by the executors of the will of Thomas H. Perkins, for directions as to the distribution of a sum of money in their hands. The parties agreed upon the following facts:

In 1818 several merchants of Boston shipped separate invoices of merchandise on board the Brig *Macedonian*, then lying at Boston, and owned by John S. Ellery, under written contracts, annexed to the bill of lading, in these words:

"It is agreed between _____, shipper, and John S. Ellery, owner of the Brig *Macedonian*, that the merchandise, specified in the annexed bill of lading, amounting as per invoice to _____ shall be carried in said vessel to one or more ports and places, round Cape Horn, or elsewhere for a market; and the net proceeds, after deducting all charges arising on said goods, and two and a half per cent., the captain's commission on the net sales, shall be invested in specie or bullion, and be shipped in said brig (or in case this vessel should be sold, in

Cabot & others, Executors, v. Amory, Executor, & others.

some other American vessel) to the United States or Canton; if to the latter place, it shall be invested in silks or nankins, of such description as the shipper may direct, and to be shipped to Boston, subject to a deduction of the usual charges in Canton, and two and a half per cent. commission to the master for investing the money, or to a deduction of one per cent. in case it is not invested and comes in specie or bullion to the United States direct. It is understood that if the proceeds should be shipped in any other vessel than the Macedonian, the freight is to be paid by the owner of said brig.

“On the arrival of the said goods in Boston, they are to be sold at auction, and the net proceeds, after deducting the duties and all other charges arising on said goods, excepting premium of insurance and interest of the money, are to be divided as follows: the original cost of the goods to be deducted from the net proceeds, and the residue, or profits, to be equally divided between the shipper and shipowner, and in like manner if in specie and bullion, which is to be in full for the freight during the whole voyage.

“In case the vessel is sold, the captain will continue with the property until it is shipped for the United States; and it is understood the owner is not liable for his conduct; and that the property is at the risk of the shipper, the voyage round. Dated at Boston, January 26th, 1818.”

The brig sailed from Boston on the 5th of February 1818, and, after selling part of her cargo at Coquimbo and Valparaiso in Chili, went to Callao in Peru, and there sold and delivered the rest of the cargo in October 1818 to some Spanish merchants for the sum of \$145,000 in specie, which was forcibly taken from the captain by the admiral of Chili, then at war with Spain. After this seizure, the captain, being prevented by want of funds from directly pursuing the contemplated voyage to China, employed the vessel in several coastwise voyages in South America; but afterwards proceeded to China, and, with the proceeds of the original outward cargo, and other funds, purchased Chinese merchandise, which was shipped in a single invoice in the name of “John S. Ellery and others;” and with

Cabot & others, Executors, v. Amory, Executor, & others.

this, and other merchandise shipped by other merchants at Canton on their own account, returned to Peru, and there sold the greater part of the cargo, and remitted a portion of the proceeds arising from the sale of this invoice of Ellery and others in specie to Boston, where it was distributed among the original shippers, according to the amount of their respective invoices; but the balance of the proceeds of the cargo there sold, amounting to \$70,000, and the goods remaining unsold, were again seized, together with the brig, by the Chilian government, and converted to its use, and the brig never returned to the United States.

These seizures constituted just claims against the government of Chili, which, after many years of negotiation between it and the United States, were finally compromised by agreeing that Chili should pay for the first seizure of \$145,000 the sum of \$104,000, with interest at five per cent. per annum from the time of the seizure to the time of payment, in seven annual instalments.

Perkins, being personally interested in the matter as one of the shippers, was appointed by Ellery and the other shippers their common agent to prosecute the claim against Chili and receive and distribute the proceeds, and by his verbal agreement with Ellery was to receive a commission in compensation for his services. He received in 1843-1845 from the Chilian government the first three instalments, and, after deducting all charges and expenses, and his own commission, and carrying to general account a certain sum to meet contingent expenses, accounted for and distributed the balance to and among the original shippers in proportion to their respective invoices. In 1846-1849 he received the remaining instalments from the Chilian government, which have never been distributed, but are now in the hands of the executors of his will, whose account shows a balance to be distributed of \$134,378.19.

No freight, or other compensation in lieu thereof, has ever been paid to Ellery by any of the shippers; and his disbursements on account of the brig, from the time she left Boston until she was seized in Peru, amounted to over \$70,000.

Cabot & others, Executors, v. Amory, Executor, & others.

The executors of Ellery's will received a certain sum as an indemnity for the seizures made by Chili, and distributed the same among the original shippers, according to their respective original invoices, and these shippers have already received back the amounts of their original invoices.

By agreement of parties, this cause was "referred to Charles G. Loring, Esq., as auditor, to report the facts, with his decisions thereon," who made a report, to which the surviving executor of Ellery's will excepted, and so much of which as concerned his exceptions was as follows :

"The question whether Ellery is entitled to receive one half part of the surplus of the amounts that shall be adjudged payable to the shippers, above those at which their goods were invoiced, or any other compensation for the use of his vessel on either passage, presents great difficulties.

"In order to its intelligent discussion, it may be desirable to determine, in the first place, the relations of the parties under the contract contained in the bills of lading and the agreements thereto annexed. The undersigned is of opinion that by these the master was made the consignee or agent of the owners of the goods, so far as the safe custody and proper disposal of them, and the accounting for, and remittances or investment of the proceeds of them, were concerned ; and the shipowner was thus exonerated from some of the liabilities under which he would have remained upon a mere bill of lading ; but that the master continued the agent of the shipowner, for the due prosecution of the voyage described, insomuch, at least, that any voluntary departure from it was at his risk, at the least so far as his interest in the prosecution of it was involved ; and so that any voluntary abandonment of it, or the inception of a new one, however consented to by the master as agent of the shippers, could give to him no rights of indemnity, or vest in him any other claims against them by reason of such abandonment.

"In the next place, it may be well, if possible, to define and determine the true meaning of the clause in which the compensation to the shipowner in lieu of freight was provided for, and what that compensation was to be.

Cabot & others, Executors, v. Amory, Executor, & others.

“ And first, it is manifest that none was to become due, or be the subject of any admeasurement, until after the arrival in Boston of the proceeds of the goods, whether in specie or in bullion, or invested in other merchandise. By the explicit terms and the nature of the contract the compensation was incapable of subdivision; and was dependent upon the hazard of profit or loss upon the adventure throughout its whole accomplishment; and was susceptible of no other adjustment than by the relation which the proceeds, thus returned to Boston, should bear to the cost of the goods at their place of departure. So that if the goods, or their proceeds, should have been lost at any point of the whole voyage, intermediate between that of its inception and that of its stipulated termination, even at the wharf in Boston before opportunity for unloading, no reward would have become due for the part performed. And no voluntary departure or abandonment, at any such intermediate point of its prosecution, could confer upon the shipowner any rights or claims to which he would have been entitled upon its accomplishment, whatever new ones might arise upon a variation of the enterprise, or upon entering on a new one; for if the owner should be considered exempt from liability to the shippers for such departure or abandonment by the master, under the clause exempting him from liability for the master's conduct, (which is by no means clear, inasmuch as that clause may be construed as confined to an exemption from liability for the master's unfaithful custody or disposal only of the goods,) it is quite manifest that the master had no authority to bind them to any contract for another voyage, or to the fulfilment of the terms of the old one upon the substitution of another undertaking; but that the relative rights and obligations of the parties would have to be determined according to the nature of the new enterprise, and upon proof of their subsequent ratification of it, there having been no precedent authority.

“ It may be worth while also to observe that the compensation stipulated for in the agreement was one half of the surplus of ‘the net proceeds,’ which is described as ‘the residue or profits,’ in terms therefore excluding other sources of it, and to

Cabot & others, Executors, v. Amory, Executor, & others.

be construed according to their ordinary acceptance in mercantile dealings.

“ It becomes necessary then, under the guidance of these principles, to ascertain whether the funds in Perkins’s hands, with interest computed as above prescribed, or any portion of them, are justly to be accounted profits upon the invoices of goods shipped at Boston, accruing on the voyage stipulated in the bills of lading and contracts annexed. It is obvious that the voyage itself was never performed. The one agreed upon was from Boston to South America, whence the proceeds were to be invested in specie and bullion, to be brought in the brig, or sent back, in the event of a sale of her, to Boston ; or to be sent to Canton for investment, and thence shipped to Boston, where they were to be sold, and the net proceeds, after deducting the invoice costs, were to constitute ‘ the profits ’ to be divided between the owner and the shippers.

“ But this enterprise was broken up and frustrated, at the port of outward destination, by the forcible seizure of nearly the whole proceeds of the sales of the goods invoiced, by the Chilian government ; so that such proceeds could neither be sent to Boston or Canton, nor invested there and returned to Boston, pursuant to the contract ; and so that any possibility of ascertaining any profits, by the only test and mode of determination prescribed by it, was utterly defeated. And the vessel, after prosecuting several intermediate voyages occupying the best part of a year, for the sole account and benefit of her owner. proceeded to Canton with another cargo, including a portion only of the proceeds of these sales, and which upon this statement must have been a small one only ; and under relations to other shippers, and with an intended termination of the voyage in Peru, which render it impossible to consider it any continuation of that originally undertaken. Inasmuch therefore as the voyage, the performance of which was to be precedent to the existence of the profits stipulated for, and the only test, or mode of ascertaining any, became impracticable, it seems to follow that no such profits can be considered as having accrued, constituting or represented by any portion of the funds in the hands of Per-

Cabot & others, Executors, v. Amory, Executor, & others.

kins; they being derived solely and exclusively from the indemnity paid by the Chilian government from the seizure and confiscation of a part of the proceeds of the sales of the outward cargo.

"It was argued however that, although the particular voyage was not completed, nevertheless this portion of it to South America was performed; and the parties, having accepted the proceeds of the sales made in South America, as paid over by the Chilian government, have so far ratified and confirmed the proceedings of the master, or consented to the abandonment of the voyage, and so have become liable *ex æquo et bono* to compensate the owner, *pro rata itineris*, for such part performance of the contract.

"It seems to the undersigned however, that so far as any claim for a *pro rata* compensation may be supposed to rest upon an implied abandonment of the voyage, or consent to such abandonment on the part of the shippers, it would be enough to say, that it could not be considered as one made by the shippers, any more than by the owner; the master being in that respect, if an authorized agent of the shippers, at least equally one of the owners; and a mutual abandonment could give neither any rights under the contract. But it seems impossible to consider these proceedings in any such light. There was no voluntary abandonment on either side, but a forcible disruption of their contract; nor was there any acceptance by the shippers of the proceeds of their goods as in part fulfilment or furtherance or continuation of the voyage. For if the moneys received from the Chilian government could by any stretch of reasoning or imagination be considered as the proceeds of the cargo, they were never received there as such, for the purposes of the original enterprise; and the payment of them from twenty nine to thirty five years afterwards, as an indemnity for a confessedly criminal violence committed upon neutral property, can hardly be accounted as delivery over of the proceeds in kind, or by way of substitution. Besides, they never were received by the master there, but were paid here under treaty with our government; and the principal sum paid fell far short of the actual amount

Cabot & others, Executors, v. Amory, Executor, & others.

seized, and of the invoice cost of the goods. Nor can this be considered a case where, although the contract was not entirely fulfilled, an equitable claim arose from a benefit derived from a partial performance; for, although the goods appear on this statement to have been sold and delivered there at a profit upon the investment, yet the proceeds were seized and became totally lost; so that no benefit, but ruin, so far as that voyage was involved, was the immediate result of such part fulfilment of the contract. Nor may it, as the undersigned thinks, be reasonably contended, that as a profit was made upon the sale of the outward cargo, and a partial indemnity has been awarded for the loss, justice requires an apportionment of the indemnity between all entitled to share in the profits and to reimbursement of the invoice value of the goods; for the only profits contemplated by the contract were those to be realized upon the termination of the voyage in Boston; and as those profits, if they can be so called in this discussion, became lost in Chili and never reached Boston, they cannot be esteemed as falling within the scope of the contract.

“But it is claimed, and has been argued with great ingenuity, that inasmuch as the total amount finally received from the Chilian government exceeds very considerably the invoice cost, and was paid in specie or bullion, the surplus over such cost is to be accounted profits, within the fair meaning of the contract, although the greater portion of it consists of interest paid from the time of the seizure; and that the gross amount paid is to be considered the proceeds of the goods, and as thus paid by instalments.

“If such amalgamation of principal and interest, under any circumstances, could be esteemed reasonable, the undersigned would still find insuperable difficulties in accounting the excess so received as profits of the voyage, within the contract under consideration. The facts would still remain that the voyage was never completed, but forcibly broken up; and that therefore neither party could claim of the other as for its fulfilment; and that, whatever name might be given to the moneys thus paid and received, the shippers could not be considered as having

Cabot & others, Executors, v. Amory, Executor, & others.

made any profits on the voyage, inasmuch as the total amount received would not be a reimbursement of the cost of the goods, allowing much less than legal rate of interest from the time of its termination by the seizure in Chili; so that they are greatly losers, although the whole amount paid at the expiration of thirty five years does exceed the original sums charged in the invoices, without interest thereupon. But the undersigned is entirely satisfied that, in deciding the question whether there were or were not any profits to be divided, it cannot be that the interest and principal are to be thus amalgamated, and so make the voyage to continue constructively for the space of thirty five years; which is essential to this hypothesis.

“The voyage upon which the parties entered was finally and fatally terminated, so far as this portion of the adventure was concerned, at the time of the seizure of these proceeds; and they never were specifically restored, nor pretended to be. The rights of all the parties became at that moment fixed, *inter sese*, and as against the Chilian government, so far as the voyage agreed upon was concerned, its further prosecution having become impossible. Any indemnity, therefore, that became lawfully or equitably due from the seizors to any of the parties, became due to them then, and was to be accounted as payable then; and all compensation, subsequently becoming due for the neglect or omission or refusal of payment at that time, accrued to those entitled to such payment, as a mere indemnity for such neglect, omission or refusal. The interest was to be in no sense any part of the indemnity for the seizure, but only for the detention or omission to pay the money due for such seizure; and belonging to those only who had become entitled to it by reason of the seizure. If the one hundred and four thousand dollars had been paid forthwith, there could have been no pretence of any profits to be divided, for such indemnity would have fallen short of the cost in Boston; and it is impossible to consider the interest allowed for withholding the indemnity admitted to have been due then, as profits on such cost. Such an appropriation of the interest would be to aggravate the loss caused by the seizure, by depriving the shippers of a very large portion of the already insufficient indemnity allowed.

Cabot & others, Executors, v. Amory, Executor, & others.

“ Upon every view, therefore, which the undersigned has been enabled to take of this part of the case, he is of opinion and does therefore find and report that no portion of the funds received by Perkins, or now in the hands of the executors of his will, can be accounted profits, to be the subject of division between Ellery and the shippers.

“ The remaining questions touching the amounts received and distributed by Ellery, being those paid by the Peruvian and Chilian governments on account of the seizure of the proceeds of a portion of the return cargo from Canton, and of such of the goods as were unsold, are attended with much greater difficulties, if not such as to render any satisfactory solution of them upon this evidence impossible, otherwise than by the application of the technical rules of law regulating the burden of proof. For the reasons above stated, and the fact that the voyage from Peru to Canton and back to Peru to terminate there was entirely inconsistent with that originally agreed upon, and that the terms upon which it was undertaken, as between the shipowner and the shippers, and between the shippers themselves, are entirely undisclosed, it must be considered an entirely new voyage, in which the master, without any authority, invested a portion of the funds belonging to the shippers of the original cargo in Boston; though what portion, and how obtained, seems upon this evidence to be wholly unknown. We have no light therefore to guide us from the original contract. It is quite clear that this procedure on the part of the master, being wholly unauthorized, and not appearing to be dictated by any necessity, (there being no apparent difficulty in transmitting his funds saved from seizure in Peru to the owners in Boston,) and there being no warrant for investing them in further speculations between Canton and Peru, might have been repudiated by the shippers, who would thereby have become exonerated from any liability to the shipowner or the master, and entitled to claim of him full indemnity for all losses thus occasioned. And it might, under other circumstances, have become a question how far their receipt of the proceeds thus remitted and distributed would have been a ratification of his acts. But that

Cabot & others, Executors, v. Amory, Executor, & others.

question, in the present aspect of the case, becomes immaterial, because, independently of other considerations, upon the only evidence before the auditor, there are no acts or relations known to which any such ratification, if existing, could attach. It is not known whether the shipments to Canton and back to Peru were on freight or half profits, under a charter, or under any stipulated arbitrary relations of value between the various interests involved in the voyage ; and therefore it is impossible to say what was thus ratified, if anything was. Nor is it known whether any, or if any, what indemnity was paid to Ellery for the seizure of his vessel, or the loss of freight, or of the profits of his voyage—all which were subjects of claim, and may have been, and, it may be supposed, were probably allowed with that for the loss of the goods.

“ All that is known from this statement is that some funds belonging to these shippers were sent in this vessel to Canton and invested there, and, thus invested, were brought back to Peru ; and that a portion of the proceeds of the sales there was remitted to the executors of Ellery's will and distributed by them ; and that a portion of the proceeds of sales in Peru and the goods remaining unsold were also seized and confiscated ; and that indemnity to greater or less extent has been received by the executors of Ellery's will, and distributed among the shippers, in the ratio of their invoices, in instalments from 1843 to 1849.

“ As the shippers have thus received the proceeds of the investments made by the master on their account in Canton, (although under circumstances that may well raise doubts whether such receipt could be accounted a ratification of his doings thus wholly unknown to them, or anything more than the plucking of so much salvage from the wreck ;) and as Ellery had thus performed a long voyage at necessarily great expense, there might seem to be some equitable claim on the part of his executors for freight or compensation to be paid by the shippers, if this were all that is or can be known ; though even then, as a legal question, the entire want of any evidence as to the nature of the voyage, whether upon a share of profits or otherwise,

and if upon profits, whether any were earned; or whether freight, if any was due, had not been deducted by the master in Canton, or on arrival at Peru; or whether the owner was not indemnified for the loss of his freight, or the emolument of his voyage consequent upon the confiscation of his vessel, (for which he was indemnified, in greater or less degree, as appears by the evidence,) as seems most probable, as such loss of freight or emolument constituted a claim equally meritorious with all others; would render it difficult, if not impossible, for any tribunal to render any satisfactory judgment in favor of such claim.

“ Beside this, the executors, or those who transmitted or paid this money to them, must be presumed to have known or to have had means of knowing on what account it was paid, and what indemnity, if any, had been allowed of the nature above suggested; and it is not to be presumed that they would have paid over these sums to the shippers, if they were not satisfied that it belonged to them, or that their testator had any just claims to any part of it.

“ It may be thought that the suggestion, that it is not known whether the master may not have deducted freight at Canton, or in Peru, is inconsistent with the last clause but one in the printed statement that ‘ no freight or other compensation in lieu thereof has ever been paid to Ellery by any of the shippers.’ It is considered, however, that this clause must be interpreted as a mere statement that none had been paid by them personally, or by their knowledge; the confessedly total ignorance of all parties, upon all that took place abroad, would preclude the interpretation of an intended admission that none could have been, or that it was known that none had been so deducted or received. But if the clause were to be so construed, the other difficulties in the way of the legal adjudication of any specific amount as due would not be the less insuperable.

“ In this state of the evidence, it is manifestly impracticable to determine the question concerning this claim for compensation satisfactorily, otherwise than by the application of the rules of law regulating the burden of proof. On that ground the

Cabot & others, Executors, v. Amory, Executor, & others.

undersigned is constrained to find and to report that the claim is not sustained by the proof; but it is one which he thinks may reasonably be the subject of friendly compromise, if further satisfactory evidence be unattainable."

W. Minot, Jr., for Ellery's executor. The contract annexed to the bills of lading was not for freight, but defined a commercial partnership adventure, enterprising and hazardous in its character, and uncertain in duration, between the shippers and ship-owner. Each party contributed his capital; interest and freight were not to be charged, but were to be merged in the profits, or surplus; this surplus was to be equally divided, and each party shared in the risk of detention, or loss. The adventure was crippled, and finally prematurely terminated, by the default of neither party, but by a *vis major*, an illegal capture. If this misfortune is chargeable as any breach of the contract or cause of variation, the fault lies with the shippers, who failed to provide a cargo or funds for the continuation of the voyage. The cargo was seized, but the vessel did proceed on the voyage. The seizure by Chili of the \$145,000 was after the adventure had so far advanced that the interest and property of the parties had become intermingled, and their rights to the proceeds had become joint and indissoluble. After the first seizure, the voyage was still carried out, by the common agent of the parties, according to his honest judgment, under the unforeseen contingency of the seizure; and the doings of the agent have been accepted and ratified by the shippers, by their acceptance of the proceeds of the Canton voyage, and they are now estopped to say that the voyage was broken up by the first seizure. It must be admitted that some freight was earned, for the outward cargo was safely delivered and the proceeds received, and so of a portion of the Canton cargo. The only just and reliable measure of that freight is the half profits; the measure stipulated by the parties, they expressly excluding time and interest. No freight or other compensation has been paid to Ellery, who has expended \$70,000 in prosecuting the voyage; the shippers have received a large surplus, which has been earned through Ellery, and by the use of his property; they agreed to charge

Cabot & others, Executors, v. Amory, Executor, & others.

no interest during the voyage, and divide the surplus; now they charge interest, refuse to divide the surplus, and propose to pay nothing for the carriage of their goods.

The \$145,000 seized included profits which belonged to Ellery, and of which he had the right of possession. The indemnity, therefore, should be equitably apportioned to him, as one among the parties injured. It is a fund to be distributed equitably, according to the rights and interests of all the parties at the time of the seizure. *Appleton v. Crowninshield*, 8 Mass. 358. *Heard v. Bradford*, 4 Mass. 326. *The Friends*, Edw. Adm. 246. *Baillie v. Moudigliani*, Park on Ins. (7th ed.) 90.

The fact that the indemnity paid by Chili was in form of \$104,000 and five per cent. interest, by way of compromise and to facilitate a settlement, cannot vary the rights of the claimants *inter se*. All that was received, to the extent of the \$145,000, was the proceeds of the goods sold, and should be so treated. If this form of settlement excludes half profits, then the shippers charge interest, which, by the contract, they were not to do; and they get, for their share, compensation for the detention of their capital, when it was agreed that none should be charged. Suppose the vessel and cargo had been illegally detained, on the homeward voyage, for ten years, the shippers could not have charged interest. How then can they appropriate interest paid for detention of cargo? The whole indemnity was paid as damages. Ellery was damaged as much as the shippers. The seizure and detention crippled the voyage in which he was largely interested as shipowner, and kept the property from his business as well as from that of the shippers.

The interest paid by Chili was in fact profits earned by Ellery on the outward voyage; the shippers' goods never could have been worth the \$145,000, (their invoice in Boston being \$105,000,) unless Ellery had transported them to Chili; and he earned the difference between the invoice in Boston and the sale in Chili, one half of which, by the contract, was to be his; so that the shippers' claim against Chili was in fact but for \$125,000, and Ellery's claim was for the balance, \$20,000.

If Ellery is not entitled to half profits, still he is entitled to

Cabot & others, Executors, v. Amory, Executor, & others.

pro rata freight. The outward cargo was duly delivered and the proceeds received by the consignee of the shippers. This was an acceptance of the goods, and freight was therefore due.

The cargo only having been seized and confiscated, and the vessel not seized, but ready and able to perform her voyage, freight is due, on the principle that when capture attaches to the cargo, and not to the vessel, full freight is due. *The Racehorse*, 3 Rob. Adm. 101, & note. Abbott on Shipping, (7th ed.) 406, 471, & notes. 1 Kent Com. (6th ed.) 125. *The Société*, 9 Cranch, 209. *The Antonia Johanna*, 1 Wheat. 169. The shippers have also accepted the delivery of the outward cargo, by receiving a portion of the proceeds thereof, invested in the Canton voyage and cargo.

If the voyage was broken up by the first seizure, Ellery is entitled to freight to Callao, because the outward cargo was sold and delivered, and the price thereof received by the shippers through the Chilian government. If the voyage was continued, and the shippers elect so to consider it, then if half profits are not due, freight could be recovered in *assumpsit*; for the authority which continued the voyage was sufficient to imply an obligation to pay freight.

Freight is clearly due on the Canton cargo, or a part of it at least; for that was carried to its destination, sold, and the proceeds duly remitted to Boston, and divided among the owners of the cargo.

F. C. Loring, for the other defendants and the plaintiffs.

BY THE COURT. The reasons for the results reached by the auditor, to which exceptions are taken, are so fully and carefully stated in his report, that it is sufficient to refer to the report itself as a statement of the grounds and reasons upon which the exceptions are overruled.

Decree accordingly.

WILLIAM THWING vs. WASHINGTON INSURANCE COMPANY.

A letter from the master of a ship to the owner, stating that she had been surveyed and condemned on account of the expense of repairs, but not stating the cause of her injuries, was sent by the owner to the underwriters with a letter of abandonment, which they declined to accept. The owner afterwards, within thirty days after receiving the master's letter, and immediately after the master's return, called with the master upon the underwriters, exhibited to them the protest and the survey, and claimed a total loss. The protest stated that the vessel met with strong breezes and a heavy sea, and was with difficulty pumped free of water, and, the leak continuing the same, anchored; and the survey declared that she was incapable of proceeding to sea unless recaulked and recoppered, and that the cost of repairs with incidental charges would exceed her value. *Held*, that the abandonment was sufficient.

Under a policy of insurance on freight from Boston to San Francisco, and thence to port or ports in the East Indies and to a port of discharge in the United States, with liberty to return with a cargo of guano from the Chincha Islands instead of the East Indies, freight earned on the outward voyage is not to be deducted from the valuation in the policy, in computing a constructive total loss of freight on the passage from the Chincha Islands home.

The condemnation and sale of a ship at an intermediate port, in consequence of damages sustained by perils insured against, entitle the owner to abandon and claim for a total loss of the freight, although the cargo has been carried to its destination in another vessel for a price equal to the freight which would have been paid if the original ship had completed her voyage and delivered her cargo and the stipulated freight has been paid by the consignees.

ACTION OF CONTRACT upon a policy of insurance, numbered 11,927, for "five thousand dollars on the Ship Carolus, five thousand dollars on the freight of said ship, on board or not, from Boston to San Francisco, and at and thence to port or ports in East Indies or east of the Cape of Good Hope, with liberty to stop at Honolulu, and at and thence to port of discharge in the United States or Europe," at a premium of five per cent., "to add one fourth per cent. for each port used more than one in the East Indies, and one per cent. for North Sea from October 1st to March 1st." This indorsement was afterwards made on the policy: "Liberty is given for the within voyage to be changed so that the ship may return with a guano cargo from the Chincha Islands instead of the East Indies." The vessel and freight were each valued in the policy at \$25,000. Trial before *Merrick, J.*, who made the following report thereof:

Thwing v. Washington Insurance Company.

The vessel delivered her cargo at San Francisco on the outward voyage, and made freight to the amount of \$23,238.80. On the homeward voyage from the Chincha Islands, she put in a leaky condition into Callao (which she was obliged to visit to obtain a clearance), was surveyed and condemned, and was sold by the master. The cargo was transhipped for the port of delivery for a freight of \$17,000 or \$18,000, equal to that which the plaintiff was to have received.

After the introduction by the plaintiff of some evidence of the amount and possibility of repairs necessary to make the ship seaworthy, the defendants admitted that the plaintiff was to recover, if anything, for a total loss of the ship.

As evidence of an abandonment the plaintiff offered a letter from himself to the defendants, inclosing one from the master to him, and the defendants' answer, all three of which are copied in the margin;* also the testimony of the master that on his

* "Callao, November 10, 1853.

"Mr. William Thwing. Dear Sir, I write to inform you that I am now nearly discharged, shall finish on Saturday next the 12th inst. and will say to you that another survey has been held on the Ship Carolus of Boston, and the report is as follows: that the ship must be hove out, stripped of her copper, and caulked from garboard to decks, and coppered anew and refastened nearly all over; and an estimate of the repairs has been called for and handed in to me, and it amounts to nearly \$17,000 in this place to make the ship fit to take a cargo home; should we find anything more when hove down, it will make an expensive bill of repairs. I have consulted the insurance agent and other experienced shipmasters here, and all are of the opinion that it will be best for all concerned to sell the ship at public auction. Therefore they have condemned the ship, and it will be sold on Wednesday the 16th inst. at public auction, for the benefit of whom it may concern, and I shall close all business here as fast as possible, and hasten to see you in Boston by the earliest opportunity. I have not heard from you since I left San Francisco. I have had a hard time of it in this ship.

"Respectfully yours, Luther Hurd."

"Boston, December 13, 1853.

"Isaac Sweetser, Esq., President Washington Ins. Co. Dear Sir, By a letter from Captain Hurd of the 10th November last, which I now exhibit, you will see that the Ship Carolus has been condemned, and was to be sold at Callao. I therefore am constrained to abandon said vessel and her freight to your com-

Thwing v. Washington Insurance Company.

return to the United States, and between the 10th and 12th of January 1854, he went with the plaintiff to the office of the defendants, exhibited to them the protest and survey, and claimed a total loss.

The protest stated that the vessel, at the time of sailing from the Chincha Islands for Callao on the 8th of October 1853, "was tight, staunch and strong, well manned, provisioned and provided with everything necessary for the said voyage, and on the following day at 4 p. m. experienced strong breezes and a heavy sea; at 8 p. m. they started the pumps, and, finding that they did not free the ship, they sounded the bell at 8 h. 20 min. and found twenty six inches of water still in her; all hands were then turned to the pumps, and at 10 h. 30 min. they succeeded in freeing her, and afterwards one pump, kept going, kept her so; that on the 10th the leak continued the same, and at 2 p. m. of the 11th they anchored the vessel in Callao Bay."

The surveyors reported "that the ship is still leaking badly, though in light ballast and at anchor in smooth water; that she is much strained, and has worked in her whole frame. We are therefore of the opinion that she is incapable of proceeding to sea, unless she be hove down and recaulked and recoppered; nor do we believe she can receive cargo with safety, unless extensively refastened both below and between decks. We are also of the opinion, taking into consideration the age and general condition of the vessel, that, even with the repairs named, it would be hazardous to load with guano to an extent beyond her register tonnage. And in view of all the above circumstances, and the excessive cost of repairing her, as is shown by

pany, so far as they are covered by policy No. 11,927, and give you notice that I claim payment of a total loss.

"Respectfully, William Thwing."

"Office of Washington Insurance Co. Boston, December 14, 1853

"Wm. Thwing, Esq. . Dear Sir, Your letter of 13th inst., tendering an abandonment of so much of Ship Carolus and her freight as are insured by our policy No. 11,927, is received, but the abandonment is not accepted.

"Yrs very respectfully, Isaac Sweetser."

Thwing v. Washington Insurance Company.

the carpenter's estimate annexed, amounting to \$12,725, we are of the further opinion that the said cost of repairs, together with such other charges of commissions and marine premiums as must accrue thereon, would exceed her value, and that she ought to be condemned and sold."

The presiding judge instructed the jury that on the evidence they could find that a sufficient abandonment had been made; and that if they found for a total loss of the ship, the plaintiff was entitled to recover for a total loss of the freight, the amount of the valuation. To these rulings the defendants excepted.

The jury found for a total loss, and rendered a verdict for the amount insured on the freight, and for the amount insured on the ship, less the salvage received on the proceeds of the sale. And the parties agreed that, if by reason of any error in the foregoing rulings the amount of the verdict ought to be changed, the case should be sent to an assessor to reform the verdict under instructions from the court.

F. C. Loring & J. Lathrop, for the defendants. 1. The loss not being actually total, a sufficient abandonment was necessary to render the defendants liable for a constructive total loss. And the abandonment acquires new importance under the recent decisions of this court, making it in effect the proximate cause of the liability of underwriters who have insured against total loss only. *Heebner v. Eagle Ins. Co. ante*, 131. *Kettell v. Alliance Ins. Co. ante*, 144.

To an abandonment, whether written or oral, two things at least are necessary; it must be sufficient, if accepted, to transfer the property to the insurers; and it must state a loss by a peril insured against.

In this case, the plaintiff's letter of abandonment stated only that the vessel had been condemned and was to be sold — which might have been on the libel of a material man in admiralty, or for being engaged in the slave trade, or any breach of the revenue laws, or any one of divers other causes. As the sale of a vessel *per se* gives no right of abandonment, *a fortiori* the condemnation does not, and the mention of the mere fact of condemnation is insufficient, and no statement of the cause of the

loss. The master's letter, inclosed in the plaintiff's, shows that the cause of condemnation was need of repairs; but not that perils of the sea were the cause of her being out of repair. *Bullard v. Roger Williams Ins. Co.* 1 Curt. C. C. 152. *Peirce v. Ocean Ins. Co.* 18 Pick. 93. *Suydam v. Marine Ins. Co.* 1 Johns. 181. *Dickey v. New York Ins. Co.* 4 Cow. 222. *King v. Delaware Ins. Co.* 2 Wash. C. C. 300. The documents handed to the defendants a month after the abandonment cannot be referred to for the purpose of supplying its deficiencies. And neither the protest nor the survey, if referred to, show anything more than a leak and need of repairs; they do not show that the leak was caused by a peril insured against.

The case of *Heebner v. Eagle Ins. Co. ante*, 131, is within the exception that if the assured, at the time of abandonment, refers to information which he has received, the abandonment is not invalidated by omitting to mention the peril which caused the loss, because the underwriters can call for this information before deciding whether to accept the abandonment; and this is the only ground upon which that case can be reconciled with the previous decisions. *Peirce v. Ocean Ins. Co.* 18 Pick. 93. *Macy v. Whaling Ins. Co.* 9 Met. 354.

2. There has been no total loss of freight. The voyage insured, from Boston to San Francisco, and to return from the Chincha Islands with a cargo of guano to the United States, was a round voyage, and the defendants, if liable at all, are only liable for the difference between the valuation and the amount earned on the outward voyage. *Emmerigon on Insurance*, c. 17, sect. 9; (Meredith's ed.) 708. *Adams v. Pennsylvania Ins. Co.* 1 Rawle, 97. The leading cases in favor of considering voyages as distinct were decided on the ground that the premium was double; which is not the case here. *Hugg v. Augusta Ins. & Banking Co.* 7 How. 610. *Davy v. Hallett*, 3 Caines, 16. Under a charter party, a voyage similar to that described in this policy, for which a gross sum was to be paid as freight, would be an entire voyage. *Towle v. Kettell*, 5 Cush. 18, & cases cited.

3. Admitting the voyages to be distinct there has been no

loss of freight on the homeward voyage. If the vessel was not constructively a total loss, it is clear that the freight was not lost. *Jordan v. Warren Ins. Co.* 1 Story R. 342. *McGaw v. Ocean Ins. Co.* 23 Pick. 405. *Lord v. Neptune Ins. Co. ante*, 109.

Even a loss of the vessel at an intermediate port, which is actually total in its nature, or which is rendered total by abandonment, does not necessarily constitute a total loss of the freight. The rights, duties and responsibilities of the different classes of underwriters are distinct in their nature, and are not to be confounded in determining their respective liabilities; and it makes no difference in this respect that the same parties insured both ship and freight. *Benson v. Chapman*, 2 H. L. Cas. 696. *Scottish Marine Ins. Co. v. Turner*, 4 H. L. Cas. 312, note. *Lord v. Neptune Ins. Co. ante*, 121, 122. *Fiedler v. New York Ins. Co.* 6 Duer, 282.

That a constructive total loss of the ship does not necessarily involve a total loss of freight is evident from the fact that the ship may nevertheless earn freight. An abandonment of the ship would transfer to the underwriters the right to the freight, just as a sale would transfer pending freight; but neither could create a liability.

In England, a total loss of the vessel at an intermediate port may perhaps be a total loss of the freight, because the master seems not to be obliged to send the goods on. *Shipton v. Thornton*, 9 Ad. & El. 338. *Gibbs v. Grey*, 2 H. & N. 22. But in the United States, the law is well settled that the loss of the ship at an intermediate port does not draw after it, as a necessary consequence, the loss of the freight; but it is the duty of the master to send the goods on in another vessel. *Schieffelin v. New York Ins. Co.* 9 Johns. 21. *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131. *Robinson v. Commercial Ins. Co.* 3 Sumner, 220. And if the goods are forwarded at an increased freight, their owner is liable therefor. *Searle v. Scovell*, 4 Johns. Ch. 218. *Mumford v. Commercial Ins. Co.* 5 Johns. 262.

The same principle applies to an underwriter on freight. He is not liable, although the ship be lost at an intermediate port, if the goods can be sent forward so as to arrive *in specie* and

earn freight. The expense of sending them on in another ship, so far as it is greater than the freight agreed on, is a charge upon the owner of the goods. If the expense is the same, it is not a charge upon the underwriter on freight; his contract being merely that the goods shall arrive and freight be earned, not that there shall be any profit. 1 Arnould on Ins. § 79. 2 Arnould on Ins. § 397. *Hugg v. Augusta Ins. & Banking Co.* 7 How. 595. *Bradhurst v. Columbian Ins. Co.* 9 Johns. 17. *Ogden v. General Mutual Ins. Co.* 2 Duer, 215.

If the master is not bound, he has the unquestionable right, to forward the cargo by another vessel and earn the freight. Or donnance de la Marine, lib. 3, tit. 3, art. 11. Pothier, Charte Partie, § 68. 2 Boulay Paty, Droit Commercial, tit. 8, § 8. Abbott on Shipping, (7th ed.) 365. If the master then sends on the goods, he does it on the original contract, and the owners of the goods are bound to pay the original freight, though this be more than the freight by the substituted ship. *Shipton v. Thornton*, 9 Ad. & El. 338. *Rosetto v. Gurney*, 11 C. B. 176. 3 Kent Com. (6th ed.) 228, 229.

If the vessel is disabled at an intermediate port, the master has a right to require payment of freight *pro rata*, or to forward the cargo and earn freight, if practicable; and his election to abandon the voyage and surrender his claim for freight should not throw a loss upon the underwriters, for which they would not be liable if he chose to forward the cargo. Here the master did send on the cargo in another vessel at the same rate of freight, which the plaintiff has received, and has therefore sustained no loss.

It is true that the shipowner pays another vessel the price which he was to receive for carrying in his own vessel; but that does not necessarily involve a loss. The owner saves the cost of wages and provisions and other expenses of navigating the ship; so that if he were entitled to recover the whole amount of the freight insured, he would receive a much larger profit than he would have received if the voyage had been performed. If there was a profit in the rate of freight over and above that cost, he loses that; but he might lose it equally by an acci-

Thwing v. Washington Insurance Company.

dental prolonging of the voyage. If there was no profit on the freight, he loses nothing.

Where a ship is disabled, and the master procures another to take on the goods and earn the freight, the policy on the freight attaches to the freight of the goods on board the new ship, and covers it, so that if that vessel is lost with the goods on board, the underwriter on it is liable. This well settled rule is entirely inconsistent with the idea that a loss of the ship necessarily involves the loss of freight.

The general principle may be stated thus: Insurance on the freight of a ship with a cargo on board attaches to both subjects, ship and cargo; and the contract of the insurer is that the owner shall not be prevented by the perils of the seas from earning that freight; but it does not attach exclusively to either subject; and if either is lost, and yet the freight is earned, the insurer is not liable. If, for instance, the cargo is lost by seizure, capture or other cause, and the master can nevertheless obtain another cargo, accomplish his voyage and earn his freight, the insurer is not liable. Or, if the ship is disabled, and the master may and does procure another to take on the cargo, and so earn his freight, the insurer is not liable.

4. If the plaintiff is entitled to recover for a total loss of freight, he must account for the freight earned and received by him for carrying on and delivering the cargo, as so much salvage; and the verdict must be reduced in that amount.

5. The validity of an abandonment depends upon the facts existing, and not upon the information received by the assured, at the time of making it. 2 Phil. Ins. § 1657. *Marshall v. Delaware Ins. Co.* 4 Cranch, 202. *Church v. Bedient*, 1 Caines Cas. 21. *Adams v. Delaware Ins. Co.* 3 Binn. 287. The abandonment in this case was made after the cargo had been reshipped and was in course of transportation; so that there was then no loss of freight.

R. H. Dana, Jr. & D. Thaxter, for the plaintiff.

Judgment was entered at March term 1859.

BIGELOW, J. 1. Assuming that, on the facts proved at the trial, an abandonment was necessary to enable the plaintiff to

Thwing v. Washington Insurance Company.

recover for a constructive total loss, we are of opinion that sufficient facts were shown to establish a valid abandonment.

If the case stood on the letter of December 13th from the plaintiff to the defendants, communicating to them the letter which he had received from the master, there would have been more reason for maintaining that the abandonment was insufficient, because neither his letter nor that of the master contained any distinct or definite statement from which it could with certainty be inferred that the loss was owing to a peril insured against. A condemnation in a foreign port, after a survey occasioned by the necessity of there making extensive and costly repairs on the vessel, without any intimation as to the cause which rendered them necessary, may, under certain circumstances, be deficient in one of the essential requisites of a valid abandonment. As such condemnation and sale might be expedient and necessary from causes other than that arising from the risks covered by the policy, a mere statement of them as the cause of abandonment, and the foundation of a claim for a total loss, may give no information to the insurer, on which he can act with safety, that the loss in fact arose from one of the perils against which he agreed to indemnify the assured. The validity of such an abandonment, however, depends very much on the circumstances under which it was made, and how it must have been understood by the parties. *Heebner v. Eagle Ins. Co. ante*, 136.

But the case of the plaintiff does not rest on these letters. It appears that subsequently, and within thirty days after he received the letter of the master communicating to him intelligence of the loss of the vessel, and immediately after the master's return, he went to the defendants in company with the master, exhibited to them the protest and survey, and then claimed of them a total loss. No particular form is necessary to constitute a valid abandonment, nor need it be in writing. It is sufficient if the assured claims a total loss of the insurers, under circumstances from which an intent to abandon may be fairly inferred. Nor is it requisite that the cause of the loss should be distinctly stated, if the assured, in

Thwing v. Washington Insurance Company.

making the abandonment, refers to the intelligence in his possession as the ground of his claim, puts it within the reach of the underwriter, and the latter omits to inquire unto the circumstances or to ask for further information. 2 Phil. Ins. § 1682. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604. *Macy v. Whaling Ins. Co.* 9 Met. 359. *Heebner v. Eagle Ins. Co. ante*, 139. The defendants could have had no doubt of the intention of the plaintiff to make an abandonment by his claim for a total loss in company with the master on the 10th, 11th or 12th of January. This verbal claim, in connection with his previous letter of December 13th, in which he made an explicit abandonment of both vessel and freight, left no doubt as to his intention, and it could not have been misunderstood by the defendants. There was a sufficient disclosure of the cause of the loss. By the protest it appears that the vessel, in her passage from the Chinch Islands to Callao, met with strong breezes and a heavy sea, after which she leaked badly; that she was tight and staunch when she set sail; and that the leaks were not occasioned by any insufficiency of the vessel. By the survey made at Callao, it is shown that she was "much strained, and had worked in her whole frame." These papers were exhibited to the defendants; and the master was present, who knew the circumstances and the occasion of the injury to the vessel, from whom the defendants might have obtained further and fuller information, if they had deemed it necessary to ask for it. Nor can it be contended that this abandonment was not seasonable. It was made as soon as the plaintiff had received sufficient intelligence of the cause of the loss to enable him to make it. On the 13th of December he communicated to the defendants all the information he had by the letter from the master of November 10th. As this did not contain any statement of the cause of the loss, the subsequent delay was not only not unreasonable, but was essential to enable the assured to make his abandonment complete and sufficient. The jury having found that the loss was occasioned by perils of the sea, and it being admitted that the plaintiff is entitled to recover for a total loss of the ship if a valid abandonment was made, we

are of opinion that he has established a right to recover so much of his claim as is equal to the sum at which the ship was valued in the policy.

2. The only other question in the case is, whether the facts proved at the trial show a valid claim for a total loss of freight to the full amount insured by the policy. Two questions arise on this part of the case.

The first is, whether, if the defendants are liable at all, a recovery is to be had for the full sum at which the freight is valued in the policy, or only for the difference between the valuation and the amount earned on the outward voyage; in other words, Is the sum which was received by the plaintiff for the carriage of a cargo from Boston to San Francisco to be deducted from the sum at which the freight is valued, in order to ascertain the sum to which the plaintiff is entitled in case of a loss of freight occurring on the homeward voyage? Upon this point we can entertain no doubt. The voyages contemplated and covered by the terms of the policy were to ports at a long distance from each other, on each of which the amount of freight pending might be very nearly equal to the valuation, and the aggregate of that which would be at risk during all the successive voyages would far exceed it. If the policy is to be construed so that the freight earned on the first voyage is to be deducted from the valuation, the freight which would be at risk during the subsequent stages named in the policy would be nearly, if not entirely uninsured. Such could not have been the intention of the parties in making the contract of insurance. In the absence of any explicit provision to the contrary, the reasonable inference is, that the parties intended to protect by the policy the subject matter which would be at risk during the successive stages of the voyages specified. The insurance is not on the aggregate freight of all the voyages, but on the freight pending during each period. The rule of law applicable to the construction of policies like the one declared on, is well and carefully stated in 2 Phil. Ins. § 1208. It is in substance this: A valuation of freight in a policy for successive voyages is presumed to be of that successively pending; but this presumption is liable

Thwing v. Washington Insurance Company.

to be rebutted by circumstances showing that the valuation is applicable to the aggregate amount of the successive freights. No such circumstances exist in the present case. On the contrary, it appears that distinct voyages or adventures, not one round voyage, were contemplated by the parties; that the amount of the outward freight, which must have been ascertained when the policy was issued, nearly exhausted the valuation, so that, on the construction contended for by the defendants, the subsequent voyages would be substantially uninsured; and that the premium seems to have been calculated on the basis of a continuance of the entire risk during the successive voyages, as is shown by the stipulation for additional premiums. Regarding the contract as one of indemnity, it should be construed in such manner as to give protection to the assured for the amount of the subject matter at risk to the extent of the valuation, unless a different intention is unequivocally manifested. For this reason a different rule of interpretation is to be applied to policies from that applicable to charter parties, in determining whether a sum stipulated to be paid for the hire of a vessel is divisible, or due only on the completion of an entire voyage or succession of voyages. *Davy v. Hallett*, 3 Caines, 16. *Patapsco Ins. Co. v. Biscoe*, 7 Gill & Johns. 293. *Hughes v. Union Ins. Co.* 8 Wheat. 294. *Hugg v. Augusta Ins. & Banking Co.* 7 How. 595. 1 Arnould on Ins. § 128. It follows that as the homeward voyage had commenced, and the entire subject of valuation was at risk, when the injury by a peril of the sea happened, which occasioned a total loss of the ship, the assured, if he can recover at all for a loss of freight, is entitled to the full sum at which it is valued in the policy.

3. This brings us to the consideration of the remaining and more interesting question, whether the facts disclosed are such as to give the plaintiff any claim on the defendants for a loss of freight. The ground on which this claim is resisted is, that although there may have been a constructive total loss of the ship, consequent on a justifiable sale, rendered necessary by perils insured against, there has been no loss of freight whatever, because it appears that the cargo with which the ship was laden

was taken out uninjured, and transhipped by the master on board of another vessel, by which it was conveyed in safety to the port of destination, where the agreed price for its carriage was paid by the consignees; and that it makes no difference in this respect, that the cost of transshipment and carriage by the substituted vessel is equivalent to the sum agreed to be paid to the plaintiff for the transportation of the cargo by the original ship.

But we cannot think this view of the facts is founded on a just appreciation of the contract of insurance on freight, or of the relation which subsisted between the master and the parties interested in the ship, cargo and freight, at the time when the constructive loss of the vessel took place. By a contract of insurance on freight, the underwriters agree to make good to the owner of the ship the sum which would have been earned as a compensation for the carriage of the cargo, but for the intervention of the perils insured against. In other words, it is an agreement that the perils insured against shall not prevent the owner from earning freight on a particular voyage. If a policy is made on the freight of a cargo laden on board of a vessel destined for a designated voyage, the risk attaches to that particular cargo on board of that vessel. It is, in effect, a stipulation that the insurer will indemnify the owner, if the vessel, owing to one of the perils insured against, is prevented from earning the freight on that cargo. It has therefore been said by this court, that after a policy has so attached to that vessel and cargo, as a general rule, with some exceptions, if the vessel is wholly lost by a peril insured against, the power of earning freight is lost, and the insurer is liable on his contract. *Lord v. Neptune Ins. Co. ante*, 113.

In the application of this rule, the effect of a constructive total loss of the vessel is the same as an actual total loss. This is the necessary result of the legal right which the owner has to abandon his vessel and give up the voyage for a sufficient cause. The contract of affreightment and that of insurance on the freight must be presumed to have been made in contemplation of a contingency which might justify such abandonment. As the ship, cargo and freight are each proper subjects of insurance,

the owner of each may well protect his interest by a policy and the right of each under his policy cannot be in any way affected or impaired by the existence of insurance on the other subjects at risk. *Lord v. Neptune Ins. Co. ante*, 121. Therefore the right of the owner, in case of a constructive total loss, to abandon his vessel and thereby to lose the power of earning freight, cannot be restricted or taken away by the existence of policies on the cargo and freight. Indeed, the insurers on the latter must be presumed to have taken, as one of the risks included in their contract, a constructive total loss of the vessel by one of the perils insured against. Therefore a technical total loss of the vessel may involve a loss of the freight; because, by her lawful abandonment to the underwriters and the consequent vesting in them of the title to the vessel and her capacity to earn freight, (if it cannot be otherwise earned,) he has lost the freight which he would have earned by the completion of her destined voyages. Such, as we have before said, with some exceptions, is the general rule, and by it the plaintiff is entitled to recover his full freight in this action, unless the transshipment of the cargo to another vessel and its carriage to the port of discharge for a sum paid to the owners of the substituted vessel, equal to that which would have been paid to the plaintiff, if his vessel had completed the voyage and delivered the cargo, takes the case out of the rule and brings it within a recognized exception to it. No authority in support of such an exception has been cited, nor are we able to find any foundation for it in the principles of law applicable to freight as a subject matter of insurance. On the contrary, it seems to us to be inconsistent with them. The elementary definition of the term "freight," as used in policies, is the earnings derived by a shipowner from the use of his vessel for the carriage of goods. 1 Phil. Ins. § 327. 1 Arnould on Ins. § 89. If a vessel is lost by perils of the sea, and the cargo is sent forward by the master by another ship, at a rate of freight equal to that which the original vessel would have earned if she had successfully prosecuted her voyage, the owner receives nothing as the earnings of his vessel. The compensation paid for the transportation of the cargo by the con

signees of the shipper passes into the hands of the owner of the substituted vessel. The insured in fact loses not only the profits which would have accrued to him from the contract of affreightment, if he had fulfilled it by delivering the cargo in his own vessel, but also the expense incurred by him in preparing his vessel for the cargo, taking it on board and carrying it to the place of transshipment. It cannot be said that under such circumstances freight, in the sense in which it was understood by the parties to the contract of insurance, has been earned by the assured. The guaranty of the insurer amounts to something more than an agreement that the cargo shall be delivered at the port of destination, so that the amount stipulated to be paid for freight shall be due from the shippers. Such an interpretation of the contract would dissociate freight, as a subject of insurance, from the vessel by which it is to be earned, and attach it wholly to the cargo; and the policy would cease to be a contract of indemnity, by which the owner of a vessel would be protected against loss by reason of the failure of his vessel to earn freight in consequence of a peril insured against.

But it is urged on the part of the defendants, that the loss of a ship at an intermediate port does not necessarily draw after it the loss of the freight; because, if the cargo remains, as in the present case, uninjured, so that it can be transhipped and forwarded, it is the duty of the master to send it on. Both branches of this proposition, taken separately, are true. No doubt there are cases where a vessel is disabled by perils of the sea, and is thus lost or abandoned, in which no claim for a total loss of freight, either actual or constructive, can be maintained. If, for example, a part of the prescribed voyage has been accomplished before the happening of the peril which has disabled the ship, and the cargo remains *in specie*, so that it can be sent forward to the port of discharge at a cost less than a moiety of the stipulated freight, no total loss of freight is thereby occasioned. In such case, it is in the power of the owner of the ship, through his agent the master, by a proper exertion of due diligence, to receive a large part of the freight which his vessel had earned prior to her loss. This opportunity he cannot disregard or throw

Thwing v. Washington Insurance Company.

away. The perils insured against have not deprived him of his freight, or of the capacity of earning it. It is the neglect and omission of his agent, the master, which prevents him from receiving from the shippers the larger part of the stipulated freight as the earnings of his vessel. But it does not follow that, in all cases where the cargo remains in a condition to be reshipped and carried to the end of the voyage, it is the duty of the master, as agent for the owner of the ship, to reship and forward it, or that, if such reshipment is made and the cargo is forwarded and delivered to the consignees, the stipulated freight is thereby earned, so that no claim for a total loss of freight can in such case be sustained. If at the intermediate port the cost of forwarding the cargo in a substituted vessel is as great as or larger than the freight stipulated to be paid by the shipper, the owner of the original vessel can earn no freight, in the sense in which this term is used in a policy on the freight of his vessel, by forwarding the cargo. Nothing can accrue to him, or to the underwriters on freight, by the transshipment and carriage of the cargo. The expense of forwarding the cargo, which is a consequence of a peril insured against, absorbs all that is received for its transportation, and there is no excess of the freight stipulated to be paid for the hire of the original vessel, over the cost of sending forward the cargo, which can come either to the owner of the vessel or the underwriter on freight.

The mistake occurs in supposing that the master is obliged, in his capacity as agent for the owner of the vessel, in all cases of disaster to the vessel, to send forward the cargo, if it remains in a condition to render its transshipment judicious and expedient. But how is any such duty or burden imposed on the owner of the vessel? Certainly not by virtue of the contract of affreightment. That involves no undertaking that the cargo shall be forwarded to its place of destination at all events and under all circumstances. On the contrary, it is always subject to the proviso that its performance may be defeated and excused by perils of the sea. Nor can it be said that the contract of insurance on freight imposes on the assured any obligation to forward the cargo after the loss of the ship, when no part of the

stipulated freight, which was the subject of insurance, can be thereby saved, but the expense of forwarding will equal or exceed the sum to be paid by the shippers. In such case the goods or the cargo by being sent forward can indeed earn freight, but not the freight covered by the policy. The lost vessel can earn no freight, nor by sending forward the cargo can anything be saved as her earnings of that part of the voyage which she has performed. There can be, in such a case, no salvage of freight. We by no means intend to say that it may not be the duty of the master to forward the cargo, after the loss of the vessel, when it can be done for the same or even a greater freight than was to be paid, under the charter party or bill of lading, for carriage by the original vessel. But such an act by the master, although judicious and expedient, would not deprive the owner of his claim for a total loss of freight. If it did, the law would operate with great inequality and injustice. An owner, in case of the loss of his vessel at an intermediate port, where the master was unable to find another vessel to carry on the cargo, would recover the whole sum insured on his freight. What good reason can be given for depriving an owner of his indemnity under his policy for loss of freight, merely because the master preserves the goods, and causes them to be sent forward to the port of destination, at a cost which absorbs the whole sum which was to be paid for the freight of the original ship, leaving nothing to be received under the original contract of affreightment? The actual loss to the owner of the ship is the same in both cases. He receives no benefit by the transshipment of the cargo. The only difference is, that the master in the latter case is enabled to do an act which may enure to the benefit of the owner of the cargo. But certainly this is no reason for taking away the owner's right to an indemnity under his policy on the freight of his vessel.

The cases cited by the learned counsel for the defendants do not go to the extent of maintaining the position on which they rely. Some of the decisions of the courts in this country contain *dicta* in which the duty of the master to tranship is stated without any qualification whatever; but it is in none of them

determined that this is a duty which in every case devolves on him as the agent of the master or of the insurer on freight. It may be difficult to define with accuracy the extent of the master's authority to act for the various parties interested in a voyage, or to fix, definitely, the point at which his agency for one party ceases and for another begins. But we think it may be safely said that whenever and as soon as the owner of a vessel, by reason of the perils of the sea, ceases to have any interest either in the ship or freight, so that nothing of either can be saved or protected by any act of the master, his authority to bind the owner is at an end. The subject matter of the master's agency for the owner of the ship has in such case ceased to exist, and his power to bind his principal ceases with it. The owner himself, if present at an intermediate port under such circumstances, would have no motive or interest in the further prosecution of the voyage. Hence it is that although, in the ordinary state of things, the master is a stranger to the cargo beyond the purposes of safe custody and carriage, yet in cases of necessity, unforeseen and unprovided for, the character of agent for the owner of the cargo may be forced upon him, not by the immediate act of the owner, but by the policy of the law; otherwise valuable property in his possession and control might be left without any means of care or protection. It may be that the owner of the vessel may adopt and ratify a transshipment made by the master, where the voyage is completed and the cargo carried in a substituted vessel for the original freight, leaving nothing as earnings of the lost vessel. The owner of the cargo could in such case make no complaint or objection, because the contract of affreightment would be fully complied with. But such an act of the master, as binding the owner of the ship, would derive its efficacy, not from his original authority, but from the subsequent ratification. In the absence of any adoption or recognition by the owner of such transshipment, we know of no principle or authority on which it can be held absolutely binding on him. On the contrary, the more reasonable doctrine is that stated in 2 Phil. Ins. § 1634: "If the motives of the master's course are wholly on the side of one party, then he

must be presumed to have acted on behalf of such party." See *The Gratitude*, 3 Rob. Adm. 240; *Shipton v. Thornton*, 9 Ad. & El. 333; *Gibbs v. Grey*, 2 H. & N. 22; Emerigon on Insurance, c. 12, sect. 16, § 6, (Meredith's ed.) 343.

Upon the direct question whether, on the facts proved at the trial, the defendants are liable for a total loss of freight, the authorities are quite decisive. In *Whitney v. New York Firemen Ins. Co.* 18 Johns. 210, the court say, "To sustain such an action on a policy for freight, the plaintiff must prove that the ship was disabled by the perils insured against, and that the cargo could not have been carried forward from the port of necessity to the port of destination for one half the freight valued in the policy." The same doctrine is fully recognized in *American Ins. Co. v. Curtis*, 4 Wend. 53, in which the chancellor states the rule thus: "If no freight *pro rata itineris* has been earned, or the expense of sending on the cargo by another vessel is equal to or exceeds the whole amount of freight agreed upon by the charter party, there is an absolute total loss of freight. If the expense of sending on the cargo by another vessel will exceed a moiety of the freight, it is a technical total loss of the freight, which will authorize the assured to abandon." These decisions, it is to be observed, were made subsequently to the decisions of the cases in the courts of the same state, cited by the counsel for the defendants, in which the duty of the master to tranship and forward the cargo had been stated in the broadest and most comprehensive terms.

In our own court the decision in *Coolidge v. Gloucester Marine Ins. Co.* 15 Mass. 341, seems directly in point. That was a case of a constructive total loss of the vessel, which was abandoned to the insurers. She was afterwards repaired, and took on board the same cargo with which she had been laden at the time of the loss, and carried it to the port of destination for "the same amount which would have been earned, if the ship had not met with any disaster." The court say that the vessel, when repaired, must be regarded as a new vessel, and if the master could have procured a new vessel to carry the goods to the port of delivery, "no one would have doubted but that the owners

Thwing v. Washington Insurance Company.

of the new vessel would have been entitled to the earnings;" and it was held that there was a total loss of freight. See also 2 Phil. on Ins. §§ 1444, 1632.

It was suggested by the learned counsel for the defendants, that the expense of forwarding the cargo by the substituted vessel was only an additional cost or charge which would destroy or take away the profits which otherwise might have been earned under the charter party, and that as the policy did not cover a loss of profits or include a guaranty that the cost of transporting the cargo to the port of destination should not exceed or equal the stipulated freight, there could be no claim for a total loss of freight in this case, inasmuch as the agreed price was paid by the consignees of the cargo. The fallacy of this argument has been already adverted to. It proceeds on the ground that the guaranty of the insured is, that the goods shall earn freight; whereas the real contract is, that the vessel shall earn freight by carrying the goods notwithstanding the perils of the sea. The interest in the freight is connected with the ownership of the vessel, and the insurance upon it is on an accessory to such ownership. It is not an insurance that the cargo will earn freight, as disconnected from the vessel. Besides, we do not see why this argument of the counsel against the right to recover in this case for a total loss would not be equally strong against the right to claim a partial loss, when a large part of the freight had been earned by the original vessel, and the expense of forwarding the cargo had been paid by the owner of the ship. It might be said in such case that the whole freight had been earned and received by the owner of the ship, and that the additional cost of transshipment was only an expense which diminished the profits that might have otherwise accrued, and was not a proper subject for a claim of loss under the policy. But it cannot be doubted that the additional freight paid for the carriage of the goods by the substituted ship would be a partial loss for which the insurer on freight would be liable.

Without going more at large into arguments and illustrations bearing on the question, we are of opinion, on the authorities

Commonwealth v. Evans.

and principles above set forth, that the plaintiff has established a claim for a total loss of freight, and that judgment must be entered accordingly.

Judgment on the verdict for the plaintiff.

COMMONWEALTH vs. WILLIAM EVANS.

Upon the sustaining by this court of exceptions in a criminal case, the costs of papers for the court are to be paid by the Commonwealth.

THE defendant was convicted in the municipal court of Boston at June term 1857, upon the *St.* of 1855, c. 405, and alleged exceptions to the rulings of the presiding judge, which were sustained by this court, with the consent of the attorney general, upon the authority of *Commonwealth v. McCaughey*, 9 Gray, 296.

The defendant now contended that in any criminal case brought up to this court by exceptions or report, under the Rev. Sts. c. 138, § 13—as expressly provided upon appeals in criminal cases from a justice of the peace, or from the court of common pleas or municipal court, by §§ 2, 3, 5, 6, *in pari materia*—the costs of copies of papers for this court must be paid by the Commonwealth, unless the defendant was convicted; the intention of the statute being to give the accused in all cases the unrestricted right of obtaining the opinion of this court upon any question of law. And THE COURT were of this opinion, and so ordered.

B. F. Butler, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

COMMONWEALTH vs. THOMAS SKELLEY.

An indictment for a nuisance by keeping and maintaining "a tenement" in a certain street and city, used in a manner prohibited by *St.* 1855, c. 405, need not more particularly describe the place so used.

INDICTMENT ON *St.* 1855, c. 405, averring that the defendant, during a certain time, at Boston, "did keep and maintain a certain common nuisance, to wit, a tenement in Portland Street in said city of Boston," then and there "used for the illegal sale and illegal keeping of intoxicating liquors."

At the trial in the municipal court of Boston at November term 1857, it appeared, on cross-examination of some of the witnesses for the Commonwealth, that the defendant with his family occupied a part of a building elsewhere as a dwelling. The defendant, at the close of the evidence, moved that the case should be taken from the jury, because the word "tenement" was too general; and this motion being overruled and a verdict of guilty returned, made a similar motion in arrest of judgment, which was also overruled; and he alleged exceptions.

G. Sennott, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

METCALF, J.* By *St.* 1855, c. 405, § 1, on which this indictment is founded, "all buildings or tenements, used for the illegal sale or keeping of intoxicating liquors, are declared to be common nuisances, and are to be regarded and treated as such." And we are of opinion that the words "a certain tenement in Portland Street in the city of Boston" sufficiently describe the nuisance which the indictment charges the defendant with keeping and maintaining. The approved forms of indictments for other common nuisances describe the place thereof as a certain building, a certain disorderly house, a certain shop, a certain common gaming house, &c., without further description. 2 Stark. Crim. Pl. (2d ed.) 687. 2 Chit. Crim. Law, 39-41. Crown

* In the cases following, MERRICK, J. took the place of THOMAS, J.

Commonwealth v. Hart & another.

Circ. Comp. (7th ed.) 519. Archb. Crim. Pl. (13th ed.) 748, 749
State v. Nixon, 18 Verm. 70. We see no more reason for a particular description of a tenement, in an indictment, than of a building, house or shop. *Exceptions overruled.*

COMMONWEALTH vs. ELLEN HART & another.

An indictment, which avers that the defendants, on a day named and on divers other days and times between that and another day, did knowingly keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, by them used and kept as a house of ill fame, and resorted to for the purpose of prostitution and lewdness; and for their own lucre and gain, certain persons, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together did unlawfully and wilfully cause, permit and procure, and, as well in the night as in the day, did suffer and permit to be and to remain whoring; to the common nuisance of all good citizens; sufficiently states a nuisance under *St. 1855, c. 405*; and is not bad for duplicity as stating also the common law offence of keeping a disorderly house.

INDICTMENT, alleging that the defendants at Boston on the 1st of June 1857, "and on divers other days and times between said first day of June and the first day of October eighteen hundred and fifty seven, at said Boston, did knowingly keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, then and on said other days and times, there situated on North Street, in said Boston, numbered one hundred and fifty eight, and then and on said other days and times there by them kept and used as a house of ill fame, and then and on said other days and times there resorted to for the purpose of prostitution and lewdness; and that the said defendants in said house, for their own lucre and gain, certain persons, whose persons and names to said jurors as yet are not known, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together did then and on said other days and times there unlawfully and wilfully cause, permit, and procure, and said men and women in said house, as well in the night as in the day, then and on said other

days and times, there did suffer and permit to be and to remain whoring; to the common nuisance of all good citizens then and on said other days and times there residing, passing and being; and in evil example to all others in like case offending; against the law, peace and dignity of said commonwealth, and contrary to the form of the statute in such case made and provided."

In the municipal court of Boston, the defendants pleaded *nolo contendere*; and moved in arrest of judgment, because the offences charged in the indictment were inconsistently, vaguely and too indefinitely set forth, and because more than one offence was set forth therein. *Huntington*, J. overruled the motion, and reported the case to this court.

B. F. Buller & N. St. J. Green, for the defendants. 1. If this indictment alleges but one offence, the allegation is too vague and uncertain. "Did keep and maintain a certain common nuisance" is clearly insufficient. Every other allegation is made under a "to wit," which cannot be used where certainty of allegation is required, but whose proper office is to avoid certainty of statement, so that strict proof shall not be required. *Durston v. Tuthan*, cited 3 T. R. 67. *Arnfield v. Bate*, 3 M. & S. 173. The allegation, being descriptive of the offence, cannot be rejected as surplusage, although laid under a "to wit." *The King v. Stevens*, 5 East, 244. But here is a twice repeated "to wit:" "to wit, a building," "to wit, a house," for which no precedent can be found. It is a slovenly mode of pleading, and not to be encouraged.

2. The indictment is bad for duplicity. It sets forth with apt words that the defendants on a day certain were guilty of the statute offence provided against in St. 1855, c. 405, §§ 1, 2, and to which a statute penalty is affixed. It then avers in the same count that the defendants were guilty of the common law offence of maintaining a disorderly house, the punishment of which is discretionary.

S. H. Phillips, (Attorney General,) for the Commonwealth.

MERRICK, J. It is contended on the part of the government that the defendants are charged in the indictment with the com-

mission of one of the offences enumerated in the *St.* of 1855, c. 405, by which all buildings, places and tenements, used as houses of ill fame, and resorted to as such, are declared to be common nuisances; and persons keeping the same are made subject, upon conviction, to punishment by fine or imprisonment, at the discretion of the court wherein they are convicted.

A verdict having been returned against the defendants, they filed a motion in arrest of judgment, upon the ground that the indictment was vague, uncertain and insufficient in its averments; and in support of this motion they insist that the indictment does not truly, nor in apt and appropriate legal terms, describe any one of the offences mentioned in the statute; or, if the contrary might, upon any just and proper principles of construction, be assumed, that it describes also the common law offence of keeping a disorderly house, and is thus bad for duplicity in alleging in a single count the commission of two several and distinct offences.

But upon a careful scrutiny of its allegations, the indictment does not appear to be so obnoxious to objection, either upon the ground of the imperfection or the redundancy of its averments, as to afford a sufficient reason for refusing to enter judgment upon the verdict. It certainly has the appearance of having been prepared with but little deliberate care, and with less attention to precision of expression in the description of the particular offence intended to be proceeded against under the provisions of the statute, than it is desirable to see in all legal, and especially in all criminal, proceedings. It contains undoubtedly several phrases which are partially descriptive of another offence, as well as of that which, we think, it is quite apparent it was the obvious purpose of the grand inquest to charge against the defendants. These phrases and forms of speech are however pertinent, and may therefore well be used in the description of different offences; but their force and significance will, in each particular instance in which they are used, depend altogether upon the manner in which they are introduced into the pleadings, and upon their connection with other allegations.

In this case the indictment sets forth that on the first day of

June, and on divers other days and times between that day and the first day of October then next ensuing, the defendants knowingly did keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, situate on North Street in the city of Boston, numbered one hundred and fifty eight, resorted to for the purpose of prostitution and lewdness. All the other allegations and parts of the indictment have immediate and direct reference to this averment of the maintenance of a common nuisance, as it is identified and particularized in the statements under the *videlicet*. The precise and legal use of a *videlicet* in every species of pleading is to enable the pleader to isolate, to distinguish, and to fix with certainty, that which was before general, and which, without such explanation, might with equal propriety have been applied to different objects. 1 Chit. Crim. Law, 226. That is the use which was made of it in this indictment. The common nuisance complained of is thus shown to be the keeping of a house of ill fame, contrary to the provisions of the statute; and by this explanation the general expression first used, though susceptible of a different meaning in itself, is restricted and confined to a precise and definite fact, and the accused are thereby secured against all danger of misapprehending the exact offence for which they are called upon to answer.

If there are other expressions in the indictment which are not essential to a distinct statement of the offence intended to be charged against the defendant, they may be regarded as useless and rejected as surplusage; for none of them are in conflict with the general purpose of the prosecution or inconsistent with an accurate description of the particular offence which is complained of.

Motion overruled.

COMMONWEALTH vs. JAMES O'HARA.

An indictment for larceny of property pledged and in the possession of the pledgee may describe it as the property and in the possession of the pledgor.

INDICTMENT for larceny of "the property, goods and chattels of Samuel Adams, in his possession then and there being."

At the trial in the municipal court of Boston at July term 1857, the evidence tended to show that the property alleged to have been stolen was deposited with George Bond and others, as security for a loan of money from them, which was to be repaid at the pleasure of the pledgor. The defendant asked the court to rule that this evidence did not support the allegation in the indictment. But *Abbott, J.* ruled that "if the property so alleged to be stolen belonged to Samuel Adams, and was pledged to Bond as security for a loan of money, with the right to resume possession by Adams, on paying the loan at his will, it was sufficient to meet the allegation in the indictment." To this ruling the defendant, being found guilty, alleged exceptions.

B. F. Butler & N. St. J. Green, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

DEWEY, J. This case falls directly within the principle of the Rev. Sts. c. 133, § 11, declaring it to be sufficient if either the general or special property in the goods stolen be in the person alleged in the indictment. Such was also the rule at common law, independently of the statute. *Commonwealth v. Morse*, 14 Mass. 217. Archb. Crim. Pl. (13th ed.) 34, 271.

Exceptions overruled.

COMMONWEALTH vs. MARTIN GRIMES.

An indictment for stealing bank bills sufficiently describes them as "sundry bank bills, of some banks respectively to the said jurors unknown, of the amount and value in all of thirty eight dollars, of the property, goods and chattels" of a person named.

INDICTMENT for stealing "sundry bank bills, of some banks respectively to the said jurors unknown, of the amount and value in all of thirty eight dollars, of the property, goods and chattels of one James Gallagher, in his possession then and there being."

After trial and conviction in the municipal court of Boston at January term 1858, the defendant moved in arrest of judgment, "because there was no sufficient allegation in the indictment as to the denomination and number of the bank bills, and no sufficient description of the offence." *Huntington, J.* overruled the motion, and reported the case to this court.

J. H. Bradley, for the defendant, cited Declaration of Rights, art. 12; *Commonwealth v. Sawtell*, 11 Cush. 142; *Commonwealth v. Maxwell*, 2 Pick. 139; *Stewart v. Commonwealth*, 4 S. & R. 194; *Low v. People*, 2 Parker C. C. 39; Archb. Crim. Pl. (10th ed.) 45-48; 2 Russell on Crimes (7th Amer. ed.) 107, 111.

S. H. Phillips, (Attorney General,) for the Commonwealth.

DEWEY, J. This indictment, it is contended on the part of the defendant, is defective in not setting forth the number of bank bills stolen, nor the value or denomination of each particular bill.

In larceny of silver coins, the general form of charging the offence as a larceny of "sundry pieces of silver coin, amounting together to the sum of twenty dollars," without describing each piece of coin, has been long practised, and sanctioned by this court. In the case of bank bills, it has been considered more questionable, and they have been usually described more particularly as to the number and denomination of the bills. Whether the general form of description adopted in the present case would be held bad on a motion in arrest of judgment, was

somewhat considered in the case of *Larned v. Commonwealth*, 12 Met. 240, but was not decided, the case not requiring it.

The same reasons exist for such general description of bank bills, as of coin. When taken from one holding them as currency for daily use, and when composed, as they may be, of all the smaller denominations of bills, it would be as difficult to describe the number of bills taken, or their denominational value, as it would be in a case for larceny of silver coin. To meet such necessity great latitude has been allowed in describing the particular coin, and we think a similar rule may be applied to an indictment for larceny of bank bills.

The amount of the bills is here alleged, as is also the value, thus showing the amount of property alleged to have been stolen.

The grounds of objection to this form of indictment are, that it does not sufficiently apprise the party of the precise offence with which he is charged, and also that it is not sufficiently particular to enable him to plead the judgment in this case in bar of a subsequent indictment for the same offence. But these might equally exist under an indictment alleging the number of bank bills stolen, as the indictment might well be sustained, though the proof showed a less amount to have been stolen. In many cases, to identify the larceny charged in a former indictment, you must resort to oral evidence. To give effect to this mode of charging the offence would leave the defendant under no greater embarrassment as to the precise offence charged, or less opportunity to plead a former conviction or acquittal in bar, than arises in many other cases where offences are held to be legally charged, although in general terms, or where the precise allegations need not be proved.

In the opinion of the court the offence is here sufficiently charged, and the motion in arrest of judgment must be overruled. See *Commonwealth v. Stebbins*, 8 Gray, 492.

Motion overruled

COMMONWEALTH vs. EDMUND E. PRICE.

In a criminal case, in which the only evidence for the prosecution was the testimony of accomplices, the judge advised the jury to acquit, but instructed them that if upon the whole evidence they were convinced beyond a reasonable doubt of the guilt of the defendant, they should find a verdict of guilty. *Held*, that the defendant had no ground of exception.

An indictment for having a counterfeit bank bill at Boston "with intent then and there to utter and pass the same" is supported by evidence of possession with intent to utter and pass it at a place out of the state.

Possession of a counterfeit bill of a bank in this state, with intent to pass it in another state, is within the Rev. Sta. c. 127, § 8.

Under an indictment for having a counterfeit bank bill with intent to pass it, evidence that the defendant subsequently had in his possession other and different counterfeit bank bills is admissible to show guilty knowledge and intent.

An accomplice, who has testified to facts criminating the prisoner and himself, cannot afterwards decline to answer a question upon the ground that it will criminate himself. But if, after so declining, he offers to submit himself to the examination, a party who refuses the offer has no ground of exception.

INDICTMENT averring that the defendant on the 18th of September 1857 at Boston had in his possession a counterfeit bill for \$500 of the Blackstone Bank, established at Boston, "with intent then and there to utter and pass the same," knowing it to be counterfeit.

At the trial in the municipal court of Boston at November term 1857, before *Nash, J.*, George R. Cowee testified that the defendant brought this bank bill and others to him, unsigned, and at the defendant's request he filled up the signatures and handed the bills back to the defendant at Boston; that the defendant asked his advice as to the best place to pass the bills, New York or Portland, and he recommended Boston, but the defendant refused to have anything to do with passing them here; that finally they and Jacob S. Stanton went to Portland, and there divided the bills among them, the defendant handing this bill to the witness; that on their return to Boston they divided their profits; and that eight days afterwards, in New York, he saw in the defendant's possession counterfeit bank bills on banks in Rhode Island and New Hampshire.

The defendant objected to the evidence of the possession of

those bills ; but the court admitted it, as bearing on the question of guilty knowledge or intent.

On cross-examination Cowee testified that he had been convicted of forgery and was now awaiting sentence, and that he testified in this case in the hope that it would make some difference in his sentence. He was then asked, " Who passed the \$500 bill in Portland ? " and declined to answer, upon the ground that it might criminate himself ; and the court ruled that he need not answer, because he had not been cautioned as to his rights, and had not gone so far in telling a part of the transaction, after having information of his rights, as to put himself beyond the protection of the rule. Other questions were put to this witness on cross-examination, which he at first in like manner declined answering, but, after partly answering them, finally withdrew his claim of privilege, and offered to answer all the questions to which he had interposed his privilege ; and the court so stated to the defendant's counsel ; but he declined to renew the questions.

Stanton testified that he saw Cowee give the defendant in Boston a bill for \$500 on the Blackstone Bank, and the defendant took out a genuine bill for \$5 and remarked that the signatures were very good ; that they then went to Portland together, and upon their return divided the money between them ; but did not state what money this was, or how it was obtained, or whether any counterfeit bills were passed ; and on cross-examination declined upon the same ground as the other witness to answer the questions, " What portion of the money which was divided did you have ? " " Did you pass any bills in Portland ? " The court excused him for the same reason as Cowee.

The attorney for the Commonwealth admitted in argument that both Cowee and Stanton were accomplices of the defendant ; and the court so instructed the jury, and further, at the defendant's request, instructed them that there was no corroboration of any material point, and that the testimony of Stanton was not to be treated as a corroboration of Cowee's, nor Cowee's of Stanton's. The defendant contended " that on the testimony of Cowee and Stanton it was not competent for the jury

to convict under this indictment." But the court "instructed the jury, that the evidence of the accomplices being unsupported by any corroboratory evidence, it was unsafe, on account of its corrupt and suspicious source, to convict upon it, without confirmation; and advised the jury to acquit; but that nevertheless it was competent for the jury to convict on the uncorroborated testimony of the accomplices alone; and if, upon the whole evidence, they were convinced beyond a reasonable doubt of the guilt of the defendant, their verdict should be guilty; otherwise, not guilty."

The defendant requested the court to instruct the jury "that under this indictment the defendant could not be convicted, unless it was proved that he had in Suffolk county in his possession the bill set forth in the indictment, and at that time intended to pass that identical bill in Suffolk county; and if the jury believed that the defendant did not intend to pass the bill in Suffolk county, but in Portland, the indictment was not sustained, and the defendant must be acquitted." But the court declined so to instruct the jury, and instructed them "that it was immaterial where the defendant intended to pass the bill; that the statute offence was complete, if the defendant had in his possession in Suffolk county said counterfeit bill, at the same time and place knowing the same to be counterfeit, and at the same time and place intending to pass the same as true elsewhere; and if said possession, said knowledge and said intent coexisted in Suffolk county at the same time, the fact that the place of actual uttering or passing contemplated was Portland, would not entitle the defendant to an acquittal." The jury returned a verdict of guilty, and the defendant alleged exceptions.

B. F. Butler & N. St. J. Green, for the defendant. 1. The jury should have been instructed, as requested by the defendant, that it was not competent for them to convict upon the uncorroborated testimony of accomplices. *Rex v. Noakes*, 5 Car. & P. 326. They may have the power, but not the right, to convict upon such evidence. See *Commonwealth v. Porter*, 10 Met. 263.

2. The indictment charges that the defendant had a certain bill in Boston on a certain day, "with intent then and there to pass the same." This "then and there" refer to the place at which the defendant intended to pass the bill; (for the time and place of his having the possession with intent had already been stated;) and cannot grammatically be referred to the intent and are not supported by evidence of an intent to pass without the Commonwealth.

3. The intent to pass elsewhere, without an intent to defraud, would not be indictable.

4. The evidence that the defendant eight days afterwards had in his possession in another state bills in no respect similar to that set out in the indictment should have been rejected. *Rex v. Smith*, 2 Car. & P. 633. *Rex v. Smith*, 4 Car. & P. 411. *The King v. Whiley*, 1 Lead. Crim. Cas. 185 & note.

5. Cowee and Stanton, having testified fully for the government without objection, were bound to answer fully as to facts making in favor of the defendant. 1 Greenl. Ev. § 451. *Foster v. Peirce*, 11 Cush. 437. *Chamberlain v. Willson*, 12 Verm. 491.

The defendant's right of exception is not taken away by Cowee's subsequent offer to testify. The defendant's counsel, not the witness, had the right to determine how the examination should be conducted.

S. H. Phillips, (Attorney General,) for the Commonwealth.

METCALF, J. 1. The court are of opinion that the defendant has no legal ground of exception to the instructions which were given to the jury concerning the testimony of his accomplices. *Commonwealth v. Brooks*, 9 Gray, 299. *United States v. Kessler*, Bald. 22. *Regina v. Stubbs*, Dearsley, 555, and 7 Cox C. C. 43. 1 Greenl. Ev. § 380.

2. Nor can we sustain the exception taken to the instruction "that it was immaterial where the defendant intended to pass the bill." The only plausible reason for this exception is found in the form of the indictment, which alleges that the defendant had the counterfeit bill at Boston, "with intent then and there to utter and pass the same." In the first place, the words "then and there," in that part of the indictment, were needless. But,

without deciding that they may therefore be rejected as surplusage, we construe them as if they had been inserted before the words "with intent," so that they refer to the intent to pass, and not to the time and place of the intended passing. If a comma had preceded and followed the words "then and there," — "with intent, then and there, to utter and pass the same" — the suggested interpretation of the indictment would have been manifest. And the court will not arrest the course of justice, merely because pleaders are careless or unskilful in punctuation, or do not make such a collocation of words as renders their meaning perfectly perspicuous on the first reading.

3. The court have no doubt that the possession of counterfeit bank bills, in the similitude of the bills issued by or for any bank established in this state, knowing them to be counterfeit, and with intent to pass them in another state, is a punishable offence under the Rev. Sts. c. 127, § 8. See *Commonwealth v. Cone*, 2 Mass. 132.

4. The authorities warrant the admission, in this case, of the testimony that the defendant, several days after the passing of the bill mentioned in the indictment, had in his possession other counterfeit bills. Archb. Crim. Pl. (13th ed.) 475, 619. 1 Greenl. Ev. § 53. *Bottomley v. United States*, 1 Story R. 143.

5. The exception to the ruling, that Stanton, the accomplice, was not bound to answer the question put to him, on cross-examination, must be sustained. He must have been fully aware of his privilege, from the beginning, and should have claimed it earlier, in order to have secured it. If a witness consents to testify at all, so as to criminate himself as well as the defendant, in the matter on trial, he must answer all questions legally put to him concerning that matter. He cannot be allowed to state such facts only as he pleases to state, and to withhold other facts. *Foster v. Pierce*, 11 Cush. 437, & cases there cited. *Low v. Mitchell*, 18 Maine, 374. If he could be allowed so to do, injustice might be done to the defendant, either by the keeping back of testimony which would tend directly to his acquittal, or which would so discredit the witness as to induce the jury wholly to disregard his previous testimony.

The like exception to the ruling, that Cowee was not bound to answer certain questions, must have been sustained, if he had not subsequently offered to answer them. But, as he made such offer, and the defendant's counsel declined to renew the questions, that exception is overruled. *Exceptions sustained.*

COMMONWEALTH vs. JAMES WOODS.

An indictment for knowingly having in one's possession a false, forged and counterfeit promissory note is supported by evidence of the possession of a genuine note which has been altered.

A bill of a bank in another state is a promissory note, within the meaning of the Rev. Sta. c. 127, § 2.

Whether it is a fatal variance, in setting out a bank bill according to its tenor, to substitute "Cashier" for "Cash" — *quære*.

It is no variance in an indictment to set forth a name as "Drown," which is actually "Drown."

A grand jury, without examining witnesses anew, may find an indictment as a substitute for another indictment found by them upon an investigation of the facts at a previous term.

INDICTMENT on the Rev. Sts. c. 127, § 2, found at June term 1857 of the municipal court of Boston, and alleging that the defendant, on the 5th of April 1857, at Boston, "had in his custody and possession a certain false, forged and counterfeit promissory note for the payment of money, of the tenor following, that is to say:

"State of Rhode Island. The Liberty Bank will pay, Providence, Aug. — 1854, to bearer ten dollars on demand.

C. R. Drown, Cashier. D. Evans, Pres't.
unless upon said promissory note there is a date of the day in the month of August eighteen hundred and fifty four, which is to said jurors unknown; the said James then and there knowing the same to be false, forged and counterfeit, with intent thereby then and there to injure and defraud."

A second count, after the name of Drown, had the abbreviation "Cash" instead of the word "Cashier."

Trial before *Nash, J.*, who signed a bill of exceptions, the material parts of which were as follows :

“ The government offered in evidence, to sustain said indictment, a bank note as the promissory note therein set forth. The defendant objected to its admission. But the court admitted the same, and ruled that, under the allegation of a promissory note, it was not a variance to prove a bank note or bank bill.

“ The cashier testified that the bank bill produced was originally a genuine one dollar bill ; that the figure 1 had been taken out and X put in, and ‘one dollar’ taken out and ‘ten dollars’ put in; and that the day of the month between August and 1854 had been obliterated in removing the figure ‘one.’ The defendant objected that such proof of an altered bill did not support the allegation of the indictment. But the court admitted the testimony.

“ In setting forth the tenor of the bill in the indictment, after the name ‘C. R. Drown’ was written the word ‘Cashier.’ On the bank note put in evidence it was ‘Cashr.’ The defendant objected that this was a variance. The court ruled that this was no variance, if both words or combination of letters sounded substantially the same. And both sides treating the question as one for the court, the court decided that they did, and that there was no variance.

“ The defendant contended that in the indictment the name of the cashier was spelt with the letter ‘u,’ viz: ‘Drown;’ whereas upon the bill the name was spelt with a ‘w,’ viz: ‘Drown,’ and that this constituted a variance. The court ruled as upon the preceding objection.

“ During the trial before the jury it appeared that some of the government witnesses were not before the grand jury at the term at which this indictment was found. Certain inquiries thereon following, it appeared, from the statement of the Commonwealth’s attorney, (which it was agreed should be received as sworn testimony, if the facts stated therein were at said stage competent, which the government denied, and subject to all objections on either side as to its competency,) that at May term

1857 three false, forged and counterfeit bank notes were before the grand jury; that, on due evidence, said grand jury duly found and returned into court three indictments against the defendant for uttering said notes, each on distinct occasions; that all of said indictments were alike in their allegations, except that, in setting out the tenor, one read 'Aug. 3, 1851,' another 'Aug. — 1854,' and the third 'Aug. 7, 1854'; that in the mean time, the Commonwealth's attorney having become convinced that the date of the day of the month had by the process of the alteration or forgery been substantially obliterated, and, on inspection, was practically a blank, brought the matter before the same grand jury at the succeeding June term; and thereupon the grand jury, without the examination of any witnesses at said June term, and at the suggestion and request of the Commonwealth's attorney, returned three new indictments against the defendant for the same three distinct utterings, and on the same three bank notes, as the first three indictments, and as substitutes for the original indictments, one of which is the present, and in all of which the date of the bill was set forth as in this one.

"Thereupon the defendant moved that, for the above reasons, and on the ground that it did not appear that he was upon trial for the same offence for which he stood indicted, the indictment be quashed. The judge overruled the motion."

The jury returned a verdict of guilty, and the defendant alleged exceptions to the rulings above stated, and also to the overruling of a motion in arrest of judgment, founded upon the manner of the finding of the indictment.

N. St. J. Green, for the defendant. 1. The allegation of a false, forged and counterfeit note is not supported by evidence of an altered note. At common law an altered note is a forged note; but in the statutes of Massachusetts the word "forged" is used in a restricted sense, and alteration is not forgery. *Rev. Sts. c. 127. Kirby v. State*, 1 Ohio State R. 185.

2. The allegation that the defendant had in his possession a certain promissory note is not supported by evidence that he had in his possession a bank note or bank bill. *State v. Ward*,

6 N. H. 529. *State v. Hayden*, 15 N. H. 355. If "promissory note," under the Rev. Sts. c. 127, § 2, includes a bank bill of another state, then the punishment is twice as great for counterfeiting a bank bill of another state, as for counterfeiting a bill of a bank incorporated in this state, under § 6.

3. The variance between the word "Cashier" and the combination of letters "Cashr" is material. Whether words are *idem sonantia* is a question for the jury. *Regina v. Davis*, 1 Lead. Crim. Cas. 346.

4. It was a question of fact for the jury whether the erroneous spelling of the name of the cashier was or was not a variance. The parties did not treat this question as one for the court.

5. The objection to the irregularity in the finding of the indictment was taken seasonably, in a proper manner, supported by competent evidence, and the proceedings must be quashed. *Rex v. Dickinson*, Russ. & Ry. 401. *Low's case*, 4 Greenl. 439. *State v. Cain*, 1 Hawks, 352. *United States v. Coolidge*, 2 Gal. 364. *The King v. Bridgewater & Taunton Canal*, 7 B. & C. 514. If this is regarded as an amendment of one of the former indictments, then it was amended after it had been returned into and made a part of the record of the court, and had passed out of the jurisdiction of the grand jury. If it is regarded as a new indictment, then it was found without evidence. The defendant was not tried for the same offence for which he stood indicted.

S. H. Phillips, (Attorney General,) for the Commonwealth.

DEWEY, J. 1. There is no legal ground for the objection that evidence tending to show that the bank note described in the indictment was originally a genuine note for one dollar, and had been fraudulently altered to one purporting to be for ten dollars, was incompetent under an indictment alleging a forgery of such ten dollar bank note. In a case like the present, the indictment is properly framed where it charges the defendant with having in his possession a forged promissory note, and uttering and passing the same as true, although the proof of the forgery be merely the false and fraudulent altering of a

genuine bank note. If any part of a true instrument be altered, the indictment may allege it as a forgery of the whole instrument. 2 East P. C. 978. 2 Russell on Crimes, (7th Amer. ed.) 320. Archb. Crim. Pl. (13th ed.) 467. The distinction is, that where the forgery is of a mere addition to the instrument, which has not the effect of altering the instrument itself, but is merely collateral to it, the forgery must be specially alleged Archb. Crim. Pl. *ubi supra*.

2. The indictment properly describes the instrument alleged to have been forged to be "a promissory note." The instrument alleged to be forged was a bank bill of a bank incorporated and doing its business in another state. A careful examination of our statutes leads to the conclusion that there is no provision in terms for punishing the offence of uttering and publishing as true a counterfeit bill of another state, unless it is embraced in the general provision for punishing the offence of uttering and publishing forged and counterfeit promissory notes, knowing them to be such. The words used in the Rev. Sts. c. 127, § 2, are quite broad enough to include such bank bills or notes, and the only objection to thus applying them is that which arises from the fact that there are various provisions in other parts of this same chapter of the revised statutes, providing punishments and penalties for knowingly having bank bills in possession that are forged and counterfeit, with intent to pass them as genuine, as well as the further provision in § 6, for the punishment of uttering and publishing counterfeit bank bills of banks within the Commonwealth, and making the maximum of punishment in such latter case less than that provided in § 2, for uttering and publishing promissory notes.

This question is not a new one. Much the same question arose under the earlier *St.* of 1804, c. 120. It was somewhat considered in the case of *Brown v. Commonwealth*, 8 Mass. 59. The form of indictment was sanctioned in *Commonwealth v. Carey*, 2 Pick. 47, and again in the municipal court of Boston by Thacher, J. in *Commonwealth v. Riley*, Thach. C. C. 67, where the objection was taken that a bank bill was not a promissory note within the *St.* of 1804, c. 120, but it was said that the

form of indictment was conformable to the practice in such cases in the highest criminal courts.

The Rev. Sts. c. 127, § 2, may, we think, be considered as equally authorizing this form of describing bank bills of other states in cases of indictment under it. The cases of *State v. Ward*, 6 N. H. 529, and *State v. Hayden*, 15 N. H. 355, hold differently, but under a statute having more distinct provisions for punishing the offence of uttering and publishing counterfeit bank bills of another state. As already remarked, we have no provision by statute for punishing this offence, unless it is found in the second section of c. 127 of the Rev. Sts., punishing the uttering and publishing of forged and counterfeit promissory notes. We think, under our practice heretofore recognized, and upon the proper construction to be given to c. 127 of the Rev. Sts. the form of the indictment was proper in the present case to authorize the admission of the evidence tending to prove the uttering and publishing counterfeit bank bills of another state, knowing them to be forged and counterfeit.

3. As to the question of variance, in that the indictment describes a bank bill purporting to be signed by C. R. Drown, "Cashier," whereas the bill offered in evidence purports to be signed by C. R. Drown, "Cash'", using an abbreviated form of expression, we have no doubt great strictness is required in the recitals where, as in the present case, the indictment alleges the counterfeit promissory note "to be of the tenor following." But whether this would be such an error as would be fatal, we have not found it necessary to decide, as this objection applies only to the first count, and in the second count, charging the same offence, the description accords with that of the bank bill produced in evidence, and judgment may therefore be taken on that count.

4. Some objection was suggested to the manner of describing the name of the cashier; the defendant insisting that in the indictment the name of the cashier was spelt with the letter "u," viz: "Droun;" whereas upon the face of the bank bill offered in evidence it was spelt "Drown," and this was urged to be a variance. But we think it would savor quite too much of nicety

to attempt to distinguish between the two letters as they appear in the present case, or to say that the name, as set forth in this indictment, did not correspond with the name as written on the face of the bank bill.

We perceive no legal objection to the course of proceedings in reference to the finding of the present indictment, nor any ground for arresting the judgment for that cause, if there were not other objections to taking this point.

Exceptions overruled

COMMONWEALTH vs. WILLIAM THOMAS.

A bill of a bank in another state is a promissory note, within the meaning of the Rev. Sts. c. 127, § 2.

Knowingly having in possession and uttering five false, forged and counterfeit promissory notes, may be charged as one offence in one count.

An indictment is not repugnant and defective, which charges the defendant with the possession of five false, forged and counterfeit promissory notes, and then sets forth certain bills of a bank in another state, and alleges that the defendant "did utter and publish the aforesaid false, forged and counterfeit bank bills as true."

An indictment for having in possession and uttering five counterfeit notes, which sets out four notes, alleges that the fifth "is different from any above set forth," and then sets out one like two of the others, is sufficient to support a conviction.

INDICTMENT on the Rev. Sts. c. 127, § 2, alleging that the defendant "had in his custody and possession sundry false, forged and counterfeit promissory notes, which the said Thomas then and there well knew to be false, forged and counterfeit, which said false, forged and counterfeit promissory notes were five in number, one of which said false, forged and counterfeit promissory notes was of the tenor following, that is to say." The indictment then set forth successively four bank bills of the Hamilton Bank in Rhode Island, and proceeded thus: "One other of which false, forged and counterfeit promissory notes, different from any above set forth, is of the tenor following," and set forth a bank bill similar to two of the previous ones. "And that the said Thomas then and there did utter and pub-

lish the aforesaid false, forged and counterfeit bank bills as true, he the said Thomas then and there so uttering and publishing said bank bills, knowing the same to be false, forged and counterfeit, with intent then and there to injure and defraud."

After trial and conviction in the municipal court of Boston, at May term 1857, *Nash, J.* overruled a motion made in arrest of judgment upon grounds stated in the opinion. The defendant alleged exceptions.

J. C. Park, for the defendant.

S. H. Phillips, (Attorney General,) for the Commonwealth.

DEWEY, J. The principal question arising in the present case is, whether an offence under the Rev. Sts. c. 127, § 2, is charged in this indictment. It charges in the terms of the statute the uttering and publishing of "sundry false, forged and counterfeit promissory notes," but in describing such promissory notes, it describes five bank notes of the Hamilton Bank in the State of Rhode Island, and the inquiry is, whether such uttering and publishing of forged and counterfeit bank bills of another state is a statute offence, and if so, whether it is properly charged by the description of the instruments as forged and counterfeit promissory notes? This question has been settled in the case of *Commonwealth v. Woods*, also argued at the present term, in the affirmative, and for the reasons of that opinion we refer to that case, *ante*, 477.

The further ground of objection to this indictment, that it charges various offences in one count, is not sustained by the fact. The indictment, as it was competent to do, charges as one offence the having in possession and uttering and publishing of several counterfeit bank bills, and a verdict of guilty may properly be rendered upon the whole charge, or upon part, as the evidence may authorize. When set forth in one count, it is however to be treated as one offence.

It is also said that there is a repugnancy and uncertainty in the allegation as to the uttering and publishing said "bank bills," whereas they had been originally set forth in the indictment merely as "promissory notes." This is true, if you confine the description to the first recital of having in possession "sun-

dry forged and counterfeit promissory notes ;" but the indictment further proceeds to set them out as " of the tenor following," describing them by exact recitals, and thus showing them to be bank notes or bills, and properly lay the foundation for the further allegation of uttering and publishing said bank bills.

Nor is there any ground for the further objection that the last of the five described notes is alleged to be different from the others, while in its recital it corresponds with two of those previously described. It would fully satisfy the terms of the allegation, that it was another and different bank bill, though of a similar form with the preceding. *Exceptions overruled.*

COMMONWEALTH vs. ABEL JENKINS.

On the trial of an indictment for receiving stolen goods, evidence is admissible of conversations between the defendant and the thief, before the commission of the offence, making arrangements for receiving the goods.

A witness, who has been impeached by evidence that he previously testified differently, cannot be corroborated by evidence that he had made still earlier statements, not under oath nor in the prisoner's presence, in accordance with his present testimony.

Whether it is ground for setting aside a verdict, that one of the jurors was not an inhabitant of the county, and that this was not known before verdict to the party against whom the verdict was rendered — *quære*.

INDICTMENT for receiving stolen goods. At the trial in the municipal court of Boston, at March term 1858, before *Huntington, J.*, the attorney for Commonwealth called as a witness *Graham*, one of the persons alleged to have stolen the goods, who testified that he and others stole the goods and sold them to the defendant, and that, while selling them, he told the defendant that the goods were stolen, and the name of the person from whom they were stolen.

The attorney then asked the witness whether, before this sale, the defendant had made any agreement to purchase any stolen goods which the witness might bring to him. The defendant objected to this question ; but the court overruled the objection ; and the witness testified that he had had previous interviews

with the defendant, at the last of which, about six weeks before the sale, the defendant had told the witness that he would buy any stolen goods which the witness might bring him; that it was not safe to carry them to other brokers; they might get detected.

It appeared that Graham had been called as a witness in the police court, on the preliminary examination of this charge against the defendant.

The defendant's counsel attempted to show, by cross-examination of this and other witnesses, that Graham, in testifying in the police court, had given a different account of the transaction from that now given by him. The defendant's counsel however put no question to Graham or any other witness, as to Graham's statements about the transactions in question, at any other time than in his testimony in the police court; nor did they ask him, or any person, when Graham first communicated the facts testified to by him to any one, or whether he had ever made any such communications to any one, other than that made in the police court.

The attorney for the Commonwealth then, for the purpose of confirming and corroborating the testimony of Graham at this trial, was allowed by the court, notwithstanding the defendant's objection, to introduce evidence that Graham, on another occasion, when not under oath, and when the defendant was not present, before the examination in the police court, had given substantially the same account of the transaction as that now given by him.

After a verdict of guilty, the defendant moved that it be set aside and a new trial granted, because one of the jurors, returned as a citizen of Boston, was not, at the time of the trial, or when drawn as juror, an inhabitant of the county of Suffolk, but had been for a long time an inhabitant of Charlestown in the county of Middlesex; and because this fact was unknown to the defendant or his counsel until after the verdict. But the court declined to hear evidence of this fact, and overruled the motion.

To these several rulings and proceedings of the court the defendant excepted.

J. G. Abbott & D. H. Mason, for the defendant, upon the admission of the evidence to corroborate Graham, cited the authorities referred to in the opinion, and 2 Russell on Crimes, (7th Amer. ed.) 940; 4 Macaulay's Hist. Eng. 676, 677; *Deshon v. Merchants' Ins. Co.* 11 Met. 199; *Howe v. Thayer*, 17 Pick. 91; *The King v. Parker*, 3 Doug. 242; *Craig v. Craig*, 5 Rawle, 97, 98; *Munson v. Hastings*, 12 Verm. 346; *Gibbs v. Linsley*, 13 Verm. 208.

S. H. Phillips, (Attorney General,) & *G. W. Cooley*, (County Attorney,) for the Commonwealth, upon the same point, cited *Commonwealth v. Wilson*, 1 Gray, 340; *Deshon v. Merchants' Ins. Co.* 11 Met. 209, 210; *Lutterel v. Reynell*, 1 Mod. 282; *Freind's case*, 13 Howell's State Trials, 32; *French v. Merrill*, 6 N. H. 465; *Henderson v. Jones*, 10 S. & R. 322; *People v. Vane*, 12 Wend. 78; *Robb v. Hackley*, 23 Wend. 50; *Cooke v. Curtis*, 6 Har. & Johns. 93; *Coffin v. Anderson*, 4 Blackf. 395; *Beauchamp v. State*, 6 Blackf. 299; *Wright v. Deklyne*, Pet. C. C. 199; *State v. George*, 8 Ired. 324; *State v. Dove*, 10 Ired. 469; *March v. Harrell*, 1 Jones N. C. 329.

BIGELOW, J. 1. Evidence of the conversation between the defendant and one of the principals in the larceny of the goods, which the defendant was alleged to have received, was clearly competent. Although the conversation took place several weeks before the commission of the crime charged in the indictment, it had nevertheless a direct tendency to prove the guilty knowledge of the defendant in receiving the stolen property. Indeed, if believed, it proved that the goods were taken by the defendant into his possession in pursuance of a previous understanding with one of the principal thieves, that he would receive any stolen property which he would bring to him. It is no objection to the competency of this evidence, that it was cumulative, and that the same witness testified to other facts which also tended very strongly to show the defendant's guilt. The court cannot reject evidence, which is legally competent and relevant to the issue, merely because in their judgment it may be superfluous.

2. The more interesting and important question presented by

the exceptions arises on the admissibility of evidence offered by the government of statements of the accomplice, who was a witness in support of the indictment, to third persons, concerning the transactions to which he had testified at the trial. The purpose of the government in offering these statements was to corroborate the testimony of the accomplice, which the defendant had sought to invalidate and discredit by proof that on the preliminary examination before the police court the witness had given a different account of his interviews and dealings with the defendant from that to which he had testified before the jury. Although there is some contrariety of opinion in the books on the question of the competency of such evidence, it seems to us that on principle it ought to be excluded. It has no legitimate or logical tendency to establish the corroboration for which it is offered. How did the case stand on the evidence of the accomplice, when the government offered the statements objected to? He had testified in behalf of the government to an account of his dealings with the defendant concerning the stolen property. The counsel for the defendant then called witnesses to show that at a previous time he had given under oath a different account of this same transaction. This evidence was offered, not for the purpose of proving the truth of such previous statements, but to show that he was unworthy of belief, inasmuch as he had given two inconsistent accounts of the same transaction, one of which was necessarily untrue. From such evidence the inference was fair and legitimate that the testimony of the witness before the jury was not to be relied on. Standing by itself, it would be difficult, if not impossible, for the jury to believe it, with the fact before them that he had made a statement before the police court, which was inconsistent with his present testimony and contradictory to it. It did not relieve the difficulty, or in any degree corroborate the last story told by the witness, to show that previously he had made similar statements of the transaction. The discredit arising from the fact that he had made contradictory statements remained untouched. The contradiction was not disproved by such evidence, and this was all that the prior statements was offered to establish. Clearly

evidence of such prior statements was not competent as substantive proof; it was purely hearsay. It was only admissible to support the credit of the witness. The utmost that could be claimed for it in this view would be, that it rendered the last statement more probable and worthy of credit, because, although the witness had made a contradictory statement, he had made another statement similar to those to which he had testified before the jury. But such a corroboration is altogether too slight and remote. Indeed, if admitted and followed out to its legitimate result, it might properly lead to a protracted inquiry to ascertain which of the two statements had been made most frequently by the witness; and when this was determined, then it would be necessary to ask the jury to believe the witness, if he had repeated the statement made before them a greater number of times than the contradictory one which had been proved to impeach his evidence. It is obvious that such a course of inquiry would furnish no means by which the credit due to the testimony of a witness could be satisfactorily ascertained. 1 Greenl. Ev. § 469. 2 Phil. Ev. (3d Amer ed.) 445. 1 Stark. Ev. (1st Amer. ed.) 147. 3 Stark. Ev. 1758. Bul. N. P. 294. *Ware v. Ware*, 8 Greenl. 42. *Robb v. Hackley*, 23 Wend. 50. *Dudley v. Bolles*, 24 Wend. 465.

The decision of the point raised in this case is not to be understood as conflicting with a class of cases, in which a witness is sought to be impeached, by cross-examination or by independent evidence, tending to show that at the time of giving his evidence he is under a strong bias or in such a situation as to put him under a sort of moral duress to testify in a particular way. In such case, it is competent to rebut this ground of impeachment and to support the credit of the witnesses by showing that, when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those which he has given at the trial. Another similar class of decisions, resting on a like principle, is also to be distinguished from the case at bar, namely, when an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the facts to which he has now testified. In

Wass v. Bartlett.

such cases, it is competent to show that the witness, at an early day, as soon as a disclosure could reasonably have been made, did declare the facts to which he has testified. Such in substance was the case of *Commonwealth v. Wilson*, 1 Gray, 340. The statement in the exceptions, of the circumstances under which the evidence objected to in this case was admitted, carefully excludes all facts which would bring it within either of the above classes of decisions.

3. As the case must go to a new jury, it is not necessary to consider the question raised in relation to the alleged incompetency of one of the jurors who composed the panel by which the prisoner was tried.

Exceptions sustained.

ALEXANDER WASS vs. WILLIAM S. BARTLETT.

A defendant arrested on mesne process, and refused the poor debtors' oath, is entitled to give a bail bond under *St. 1857, c. 141, § 22.*

HABEAS CORPUS. The petitioner was arrested on mesne process and taken before a magistrate under *St. 1857, c. 141, § 21*, who refused to administer to him the poor debtors' oath. Upon being committed to jail, he offered to give a bail bond, which was refused, and this writ was sued out.

A. S. Wheeler, for the petitioner.

B. Dean, for the creditor.

BY THE COURT. The provision of *St. 1857, c. 141, § 21*, that a debtor arrested on mesne process, and carried before a magistrate, and by him refused the poor debtor's oath, and committed to jail, shall be "there kept until final judgment in the suit in which he was arrested," is qualified by the subsequent provision "unless he shall" do one of certain acts, one of which is giving a bail bond according to § 22. *Prisoner discharged.*

MOORE R. FLETCHER vs. WILLIAM S. BARTLETT.

A magistrate's refusal of an application to be admitted to take the poor debtors' oath, under *St.* 1857, c. 141, upon the ground that the debtor has property, is conclusive; and an appeal taken from the decision of the magistrate, finding him guilty upon charges of fraud filed at the same time, does not exempt him from arrest on the execution.

PETITION for a writ of *habeas corpus*, in behalf of a poor debtor, who, after being arrested on execution, entered into a recognizance under *St.* 1857, c. 141, § 10, for his surrender within ninety days; and applied to a master in chancery to be admitted to take the poor debtors' oath; whereupon the creditor filed charges of fraud against him, and the master refused to administer the oath to him, on the ground that he possessed property, and also convicted him upon the charges of fraud and sentenced him accordingly. From this judgment he appealed, and entered into a recognizance under § 14 of the statute to prosecute his appeal, and was afterwards rearrested on the same execution.

D. E. Ware, for the petitioner.

H. C. Hutchins, for the creditor.

SHAW, C. J., to whom this petition was presented, after consulting *Metcalf* and *Bigelow*, JJ., expressed the opinion that the proceedings upon allegations of fraud were distinct from the ordinary proceedings upon an application to be admitted to take the poor debtors' oath; that the ordinary inquiry upon such an examination was, whether the debtor had property, and if he had, the oath was refused, and from the decision of the magistrate on this point there was no appeal; that allegations of fraud, if filed, raised distinct issues, from the decision of the magistrate upon which both creditor and debtor had a right of appeal; that such appeal did not carry up the whole case, but only the finding upon the charge of fraud.

Petition dismissed.

MATTHEW STARBUCK *vs.* JOHN H. SHAW.

In the absence of any special agreement or usage, one partowner of a ship, who has contributed with the others, in proportion to their interests, to her outfit for a whaling voyage, is not liable, while the adventure is unfinished, to an action at law for his proportion of the amount of a bill of exchange drawn by the master in a foreign port upon the managing owner and paid by him; and such liability is not therefore the subject of a set-off in an action at law.

ACTION OF CONTRACT on a promissory note payable to the plaintiff or order. The defendant filed a declaration in set-off alleging that the plaintiff was a joint owner with him and others of the Ship Barclay, the plaintiff owning one eighth; that the master of the ship drew a bill of exchange for \$3384.48 on the defendant as agent of the owners of the vessel, for her use in a foreign port, and for other expenses of the voyage, which bill was paid by the defendant; and that the plaintiff owed the defendant the sum of \$438.82, being the plaintiff's contributory share of the amount of that bill.

Trial in the court of common pleas at Nantucket at October term 1857, before *Sanger, J.*, who signed a bill of exceptions, which stated the pleadings, and the residue of which was as follows: "The plaintiff asked the court to rule that the foregoing claim of the defendant was not a legal matter of set-off to the plaintiff's action. But the court ruled that it was a proper matter of set-off, and the jury found a verdict for the defendant in the sum of \$139.04; and to this ruling the plaintiff excepted."

S. Bartlett, for the plaintiff, cited *Holderness v. Shackels*, 8 B. & C. 612; *Nicoll v. Mumford*, 4 Johns. Ch. 522 and 20 Johns. 611; *Williams v. Henshaw*, 11 Pick. 79; Story on Part. §§ 408, 443, 444.

J. C. Stone, for the defendant, cited *Abbott on Shipping*, (7th ed.) 107; Story on Part. §§ 419, 440; *Collyer on Part.* book 5, c. 3, sect. 4.

BIGELOW, J. The only question in this case is, whether the defendant can maintain his claim in set-off. It was stated at

the argument of the case, and admitted by the counsel for the respective parties, although not fully set out in the bill of exceptions, that the debt which the defendant seeks to prove in set-off to the plaintiff's claim upon the note declared on was incurred under the following circumstances: The plaintiff and defendant together with sundry other persons are part-owners of a ship called the Barclay, in different proportions, the plaintiff being the owner of one eighth; the ship was fitted out for a whaling voyage in distant seas; the owners of the vessel were jointly interested in the adventure or voyage in the same proportions in which they own the vessel, and contributed in like proportion towards the expenses and charges of preparing the vessel and procuring her outfits, and are to share in the profits and losses resulting from it accordingly; the defendant is the managing owner, and as such the agent of the other owners for fitting out and preparing the vessel, paying the necessary charges and expenses incurred during the prosecution of the adventure, receiving the catchings or proceeds, and settling up the accounts of the respective owners with each other at the termination of the voyage; the voyage has not yet been completed; and the debt which is now claimed to be set off in this suit was the proportion or share, being one eighth, which the plaintiff was bound to pay, as one of the partners jointly interested in the voyage, of a certain bill of exchange drawn on the plaintiff by the master of the vessel, to enable him to pay for supplies furnished to the vessel in a foreign port, and which had been paid by the plaintiff.

Upon these facts, which are not controverted, it seems to be very clear that the parties, so far as this voyage and adventure are concerned, sustain towards each other the relation of copartners. They are jointly interested in a mercantile enterprise to which they have respectively contributed in certain proportions their capital; they are joint owners of the property embarked in the transaction, and are to share the profits and losses which may result from the joint business in which they have engaged. The elementary definition of a partnership is an agreement between two or more persons to share the profits and losses of

their joint undertaking, whether it have reference to a trade or business, or merely to some particular adventure.

Such being the legal relation of the parties, in the absence of any proof of a special agreement between them, or of a usage or custom of trade which changes their relative rights and liabilities, it is clear that the defendant cannot maintain his set-off. He has no right of action at law against the plaintiff. While the partnership is still in existence and its affairs are unsettled, and the result of the joint business or undertaking is unknown and uncertain, one copartner cannot maintain an action at law against his copartner to recover money advanced by him in carrying on the joint business beyond the just proportion which he is bound to pay. It is only after a dissolution of a copartnership, when there is a balance due after all the debts of the firm are paid, so that the recovery of this balance due to one of the firm from his copartners will effect a final settlement between the copartners, that an action at law can be maintained by one copartner against another. *Sikes v. Work*, 6 Gray, 433, & cases cited. *Shattuck v. Lawson*, ante, 407.

It is quite possible that the defendant may be able to prove at another trial that a usage prevails in the conduct and management of the whale fishery, which will authorize him to require immediate payment by his copartners of advances made under circumstances such as were disclosed by the evidence in this case. But no such usage was attempted to be proved at the trial, and the counsel for the plaintiff do not admit its existence.

Exceptions sustained.

SETH ADAMS & another vs. BOSTON IRON COMPANY.

A contract to build and set up engines for a corporation was made with them through their agent, who became insolvent before the engines were completed, and the contractor thereupon, supposing the principals to be involved in their agent's insolvency, stopped his work, carried away parts of the engines already set up, and gave notice that he should not complete the engines without further security, and the corporation told him that they did not consider themselves bound by the contract. *Held*, that the contract was discharged, and could not be enforced against the corporation without evidence of a new agreement by them that the contractor should go on and complete it.

ACTION OF CONTRACT upon an agreement in writing, made with the plaintiffs by the defendants through Horace Gray, their treasurer and general agent, in December 1846, to build four steam engines and set them up at South Boston on or before the 1st of July 1847; the defendants agreeing on their part to have the foundations ready six weeks before, and to pay for the engines, one half in April 1847, and the other half within thirty days after they should be completed and set up.

At the trial before *Merrick, J.*, one of the plaintiffs testified that they were paid half the price by Gray in April 1847, finished two of the engines in July or August 1847, and went on with the others as fast as the foundations were ready to receive them; that in November 1847, the last two engines not being yet completed, but so far advanced that they would have been finished and started in a day or two, Gray became insolvent; that the plaintiffs then, supposing the defendants to be involved in the insolvency of their agent, and in order to make themselves as safe as possible, took away such parts of the engines already set up as could easily be removed; that the witness asked the defendants' treasurer, appointed after the failure, whether the defendants wished the plaintiffs to complete and finish the engines according to the agreement, and in reply was told that the corporation never made nor were bound by any agreement with the plaintiffs. There was no evidence that the defendants gave any subsequent consent to the completion of

City of Boston v. Worthington & others.

the work, or assumed any further liability. But it appeared that the plaintiffs afterwards completed the engines for the Massachusetts Iron Company, to whom these works belonged, reserving all the plaintiffs' rights against these defendants.

The defendants contended that the agreement was discharged by the refusal of the plaintiffs to continue the work, and could not be held binding on the defendants, without proof of some subsequent agreement by them, and that there was no evidence which would sustain a verdict for the plaintiffs. And of this opinion was the presiding judge. A verdict was taken for the defendants accordingly, and his ruling was now confirmed by the whole court.

R. Choate & C. W. Loring, for the plaintiffs.

E. R. Hoar, for the defendants.

CITY OF BOSTON *vs.* ROLAND WORTHINGTON & others.

A verdict and judgment against a city, in an action for personal injuries occasioned by a defect within the limits of a highway, are conclusive evidence in a subsequent action by the city against a tenant of the land (who had notice of the pendency of the former action and of the city's intention to hold him responsible for all damages recovered therein, and had opportunity to furnish evidence, and testified at the trial, although he was not requested to and did not take upon himself the defence of that action) that the highway was defective, that the person was injured there, while using due care, and of the amount of the injury; but not of the tenant's liability to keep the place in repair, nor of his having neglected to do so, nor of such negligence having been the sole cause of the injury.

A covenant in a lease "that no alteration or addition shall be made in or to the premises without the consent of the lessor" does not relieve the lessee from liability for injuries resulting to a third person from want of repair of the premises.

ACTION OF TORT, to recover the amount of a judgment recovered in this court by George F. Southwick against the plaintiffs, who paid the amount to him. Trial before *Bigelow, J.*, who reported the following case :

"Southwick alleged in his declaration against these plaintiffs that he was greatly injured in his person, by falling into a cellar

way in Congress Square, one of the public streets or highways in Boston, which the city was bound to keep in proper repair and in safe condition for public travel; that he fell into this cellar way, while he was passing through Congress Square, and using due care, by reason of the cellar way projecting into the highway and not being properly protected or guarded by railing or otherwise.

"After the commencement of the suit by Southwick, the plaintiffs notified the defendants of the pendency thereof; that they might furnish any evidence they had or could procure in defence thereof; and that the plaintiffs would hold the defendants responsible for all damages which Southwick should recover against the plaintiffs in that action.* Two of the defendants were present at the trial, and testified therein. Southwick recovered in that action the amount of \$12,000 damages and \$257.82 costs.

"The defendants, at the time when Southwick met with this accident, were the tenants of a portion of the building and of the cellar under the same in Congress Square, leading to the cellar of the brick building, which was the cellar way into which Southwick fell; and they held their portion of the premises under a lease, in which they covenanted 'that no alterations or additions shall be made during the term aforesaid in or to the same, without the consent of the lessors, or of those having their estate in the premises, being first obtained in writing.'

"The defect in the cellar way was, that it was not covered

* City Solicitor's Office, October 15, 1852.

Messrs. Worthington, Flanders & Co., Proprietors and Publishers of the Traveller. Gentlemen: George F. Southwick of Boston has brought an action against the city of Boston, by writ returnable at the next November term of the supreme judicial court, to recover damages for an injury which he alleges he received by an alleged defect in the highway called Congress Square, in a place understood to be occupied by you. The accident is alleged to have occurred on the 20th day of August last, and damages have been laid at \$30,000. You will please to take notice that the city will hold those responsible who had the charge and custody of the place of the accident. You will govern yourselves accordingly.

Very respectfully your obedient servant,

P. W. Chandler, City Solicitor.

City of Boston v. Worthington & others.

nor protected by a railing three feet high above the sidewalk, as required by the ordinances of the city, and it had been in the same state for over twenty years. [Ordinances of Boston of 1850, p. 528.]

"The plaintiffs contended that the defendants were, under the circumstances above stated, concluded by the judgment of Southwick against them, and all matters therein adjudicated; and that they were estopped to deny the same, or their liability to pay the plaintiffs the amount thereof; and they offered no evidence to support their case, except said judgment.

"The defendants contended that they had not such an estate, in the building and premises occupied by them, as made them liable for the defect in the cellar way, and that they had no control or authority to alter it; and that if they then were so liable, by reason of their tenancy as aforesaid, they were not concluded by the judgment of Southwick against the plaintiffs, but were at liberty, in the trial of this action, to traverse every fact adjudicated therein, except the amount of damages recovered.

"A verdict was returned for the defendants by consent, with the agreement that if, under the lease aforesaid, the defendants were responsible for the condition of the cellar way, and if the judgment aforesaid was sufficient evidence to sustain the plaintiffs' allegations, without further proof, then the verdict should be set aside, and a new trial ordered; otherwise, judgment to be rendered for the defendants on the verdict."

G. S. Hillard & J. P. Healy, for the plaintiffs.

R. Choate & H. F. Durant, for the defendants.

METCALF, J. Southwick's judgment against the plaintiffs is conclusive against the defendants, as to all the facts thereby established, provided the defendants had due notice of the pendency of the action in which that judgment was recovered, and had an opportunity to defend it. So far the adjudications are decisive. In *Littleton v. Richardson*, 34 N. H. 187, Bell, J. thus states the law: "When a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon

him the defence of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he has appeared or not." In addition to the authorities there cited in support of this position, see *Clark v. Carrington*, 7 Cranch, 322; *Hamilton v. Cutts*, 4 Mass. 353; *Bond v. Ward*, 1 Nott & McCord, 201; *Kip v. Brigham*, 6 Johns. 158.

It is not denied by the defendants, and cannot be, that they are responsible over to the plaintiffs, by operation of law, if the plaintiffs were held answerable to Southwick by reason of the sole fault of the defendants. *Lowell v. Boston & Lowell Railroad*, 23 Pick. 24. *Lowell v. Short*, 4 Cush. 275. *Lowell v. Spaulding*, 4 Cush. 277.

Had the defendants such notice of the pendency of Southwick's action, as renders the judgment recovered therein conclusive against them, to any extent? We are of opinion that they had. They were informed when Southwick's writ was returnable; that he had sued for an injury received on a day named, by a defect in the highway, called Congress Square, in a place occupied by them; they were directed to take notice that the plaintiffs would hold those responsible who had the charge and custody of the place of the accident; and they were required to govern themselves accordingly. They were not, in terms, requested to take upon themselves the defence of that action. And this was not necessary in order to render the judgment conclusive against them as to the facts thereby established. *Blasdale v. Babcock*, 1 Johns. 517. *Barney v. Dewey*, 13 Johns. 226. *Warner v. McGary*, 4 Verm. 508. *Beers v. Pinney*, 12 Wend. 309. The defendants, by the notice given to them of Southwick's action, had an opportunity to defend it, and the case shows that they "were present at the trial, and testified therein." This fact, according to Spencer, J. in 13 Johns. *ubi sup.* is sufficient to show such notice as to render the judgment conclusive against them.

City of Boston v. Worthington & others.

The defect in the highway, for which the plaintiffs were made answerable to Southwick, was an uncovered cellar way, not protected by such a railing as was required by the ordinances of the city; and this defect existed before the defendants occupied the place of the accident. And they contend that they had no legal right to remedy that defect, and therefore are not responsible for it, because their lease provided that no alterations nor additions should be made by them, without the written consent of their lessors. But we have no doubt that the repairing of a defect is not an alteration nor an addition, within the meaning of the lease. Nor do we suppose that a covenant by the defendants, with their lessors, to continue a nuisance, would exonerate them from liability to third persons, or to the Commonwealth, for its continuance.

The judgment recovered by Southwick against the plaintiffs is conclusive against these defendants, on three points: That the highway in Congress Square was defective; that Southwick was injured there, while using due care; and that he suffered damage to the amount of twelve thousand dollars. But it is not conclusive against the defendants on the question whether they were bound to keep the highway safe, or, if they were, that they were guilty of such negligence as would charge them in this suit, or would have charged them, if Southwick had brought an action against them; nor on the question whether Southwick's damage was caused by their sole fault.

On a new trial of this action, which must be ordered, the defendants may be permitted to show that they were not bound to make the highway safe, or, if they were, that Southwick's injury was not caused solely, if at all, by their default. If it was caused by the joint fault of the plaintiffs and defendants, the plaintiffs cannot recover. One of two joint wrongdoers cannot have either indemnity or contribution from the other, although he may have been compelled to pay the whole amount of the damage caused by their joint wrong. *New trial ordered.*

Upon a new trial at this term, a verdict was returned for the defendants, on which judgment was rendered.

EDWARD MINTURN *vs.* MANUFACTURERS' INSURANCE COMPANY.

It seems, that under the St. of 1852, c. 312, a demurrer to part of one count in a declaration is inadmissible, even if the matters alleged are divisible in their nature. But if admissible, it goes merely to the manner of stating the cause of action, and cannot be argued before the full court, until the whole case has been tried by a single judge.

This indorsement upon a policy of insurance, "Pay under the within policy to J. S. or order," is only an order to pay him the amount of any loss, and not an assignment of the policy; and if the policy stipulates that it shall "be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers," an assignment of the policy and assent of the insurers cannot be shown by oral evidence.

ACTION OF CONTRACT, brought in this court, upon a policy of insurance, whereby the defendants insured "Jones & Johnson, payable to them for whom it concerns, \$8800; namely, \$1100 on one hundred and seventy tons coal, and \$2700 on the freight on the same, on board of Brig Oriental, at and from New York to San Francisco."

The policy contained this stipulation: "It is agreed that this policy shall be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers;" and bore these indorsements:

"Pay under the within policy to O. W. Pollitz or order,
"Jones & Johnson."

"May 24th 1850. Assented to. C. W. Cartwright, Pres't."

"June 10th 1850. Pay under the within policy to Edward
Minturn or order. O. W. Pollitz."

"November 7th 1850. The Oriental having deviated, by an unreasonable delay in getting to sea, this company, in consideration of seventy six dollars additional premium, waive all objections on account of such delay. C. W. Cartwright, Pres't."

The declaration alleged that the policy was effected by Jones & Johnson as agents for Otto W. Pollitz, and by them assigned to him; that Pollitz had previously shipped the coal on the brig and paid the freight, and had since, with the defendants' assent in writing, and before the loss, sold and assigned to the plaintiff the coal, the advance freight, and the policy.

Minturn v. Manufacturers' Insurance Company.

The defendants in their answer demurred to so much of the declaration as related to freight, and for cause of demurrer assigned that it did not appear by the declaration that the plaintiff had any insurable interest therein; and answered on the merits to the rest of the declaration.

This point was disposed of at November term 1855.

R. Fletcher & S. Bartlett, for the defendants. The demurrer presents the question whether Pollitz, not being an owner of, or interested in, the brig, had any insurable interest in the freight insured by the policy, so that the plaintiff, claiming under him, can recover that freight in this action. [THOMAS, J. How can this demurrer be argued now? The whole case is not here, and we cannot hear it in fragments. The demurrer is to part of the cause of action, to a part even of one count. If the action had been commenced in the court of common pleas, and that court had ruled upon the demurrer, the case could not have been brought to this court, because there would still be an issue of fact pending in the court of common pleas. Precisely the same difficulty occurs here. The case stands at *nisi prius*.] A demurrer may be to part of the declaration, or to part of a count, provided the matters alleged are divisible in their nature. 1 Chit. Pl. (6th Amer. ed.) 703. By the new practice act, in personal actions, "the general issue is abolished, and in place thereof the defendant shall file an answer to the declaration;" and "to raise an issue in law, the answer shall contain the statement that the defendant demurs to the declaration, or to some one or more counts therein, as the case may be, and shall assign specially the causes of demurrer." St. 1852, c. 312, §§ 12, 17. But that act does not change the previous practice, except in the manner of taking issues. The court of common pleas may settle the order of the trial of issues of law and of fact, in cases pending before them, as they please; and a case cannot be removed from that court to this, by exceptions or appeal, until the whole case is disposed of. But this case has always been in this court. And in this court "all issues of law shall be heard and determined exclusively in the full court." Rev. Sts. c. 81, § 13. The case must be tried in fragments; if the issue of fact were tried first,

Minturn v. Manufacturers' Insurance Company.

it must be tried by itself, by a single judge and a jury ; and then the issue of law would have to be heard by the full court, and if the demurrer were overruled, the case might go back again for a trial of the facts involved in that part of the case to which the demurrer applied. The practice of this court has always been to hear the issue of law first, for the reason that the determination of that would often render a trial of the facts unnecessary. Section 23 of the practice act provides that "every demurrer may, in the first instance, be heard by a single justice ; and his decision as to the verification of an allegation or the misjoinder of counts shall be final, an amendment being allowed as hereinafter provided. But if the cause of demurrer shall be that the facts stated do not in point of law support or answer the action, and the party against whom the decision shall be made shall not pray for leave to amend, the decision of such single justice shall not be final, but such demurrer may be further heard, upon appeal or otherwise, as is now provided in respect to such questions of law," that is to say, by the full court. But this section does not require that every demurrer shall be heard by a single judge, when his decision would not be final.

C. P. Curtis, for the plaintiff, was stopped by the court.

SHAW, C. J.* By § 23 of the practice act, (*St.* 1852, c. 312,) if a demurrer goes to the whole cause of action, that is, if it raises a question of law on the merits, the decision of a single judge is not final, but may be revised by the full court. But if the demurrer goes to delay, being taken as to matters of form merely, the decision of the single judge is final. The mention of "the verification of an allegation" in this section, was inadvertently retained, the provision, in the act as reported by the commissioners, requiring pleadings to be verified by the oath of the party, having been stricken out by the legislature in the original practice act of 1851, c. 233.

This demurrer is to part only of the cause of action stated in one count, and is therefore inadmissible ; or if admissible, it goes

* BIGELOW, J. did not sit in this case.

Minturn v. Manufacturers' Insurance Company.

to the manner in which the cause of action is stated, and is to be passed upon by a single judge. Whenever the cause of demurrer is that the facts alleged will not support the action, that is a question on which the whole court are to pass. Anything short of that goes to the form of the declaration, and the decision of a single judge thereon is final.

The defendants then had leave to withdraw the demurrer, and amend their answer, and the case was tried at March term 1857, before *Merrick, J.*, who reported, for the decision of the whole court, the following case :

"In addition to the policy and the indorsements thereon, and some other evidence not necessary now to make mention of, the plaintiff produced evidence to show that, at the time of the issuing of this policy, Otto W. Pollitz and John Codman were the owners of the coal insured, and had prepaid the freight thereof, at the rate of sixteen dollars per ton, from New York to San Francisco; that the said insurance was made and the said policy procured at their instance and for their benefit, and that they paid the premium charged and received by the defendants therefor; that subsequently, but before the *Oriental* left New York, to wit, on or about the 10th of June 1850, the coal insured and the prepaid freight were sold and conveyed by Pollitz, for himself and Codman, to the plaintiff, and the indorsement on the policy was at the same time signed by Pollitz.

"John S. Tyler, called as a witness for the plaintiff, testified that he paid to the defendants the seventy six dollars additional premium mentioned in the indorsement on said policy, dated November 7th 1850, for the plaintiff, and afterwards drew on him for the same, and received that amount of him therefor. The plaintiff offered to prove by this witness that he, at the time of making said payment, informed the defendants that he made it for and on account of the plaintiff; but this part of his proposed testimony, being objected to as incompetent by the defendants, was excluded by the court.

"The defendants thereupon objected that this action could not be maintained upon the evidence produced by the plaintiff,

1st, because he had not shown any contract between themselves and him, or any assignment of said policy to him; and, 2dly, because he had not shown that if said policy had at any time been assigned to him, the defendants had ever assented in writing thereto.

"The defendants also objected that the plaintiff could, in no event, recover anything on account of the freight of said coal or the prepayment thereof." *

Curtis & C. P. Curtis, Jr. for the plaintiff. 1. The indorsement of the 10th of June is a sufficient assignment, if assented to by the defendants, to entitle the plaintiff to recover under the policy. *Wiggin v. American Ins. Co.* 18 Pick. 158. *Tolman v. Manufacturers' Ins. Co.* 1 Cush. 73. *Hartley v. Tapley*, 2 Gray, 565. It is in the nature of a power of attorney irrevocable, coupled with an interest; and the indorsement of the 7th of November, having been afterwards written on the policy without objection, is to be regarded either as an assent by the underwriters, or a waiver of the necessity of a written assent.

2. The indorsement of November 7th has a twofold character. Like a bill of lading, it is both a receipt and a contract. Tyler's testimony was competent to show from whom the money was received; that is, to explain that part of the bill of lading which is a receipt. *Brooks v. White*, 2 Met. 283. *Gerrish v. Washburn*, 9 Pick. 338. *Barrett v. Union Mutual Fire Ins. Co.* 7 Cush. 175. *O'Brien v. Gilchrist*, 34 Maine, 554. 1 Greenl. Ev. §§ 297, 305. *Browne on St. of Frauds*, § 91. 2 *Parsons on Con.* 67.

Fletcher & S. E. Sewall, for the defendants.

The opinion was delivered at March term 1859.

DEWEY, J. Upon the well settled principles of the insurance law, the policy procured in behalf of Pollitz and Codman upon their property and interests, was a policy for their benefit. It was however not only essential that they should have an interest in the subject of the insurance at the time of receiving the policy, but this interest of the assured must continue and be

* See *Minturn v. Warren Ins. Co.* 2 Allen, 86.

Minturn v. Manufacturers' Insurance Company.

subsisting at the time of the loss. Where there has been an absolute transfer of the property insured, leaving no interest in the assured, there is nothing for the insurance to operate upon in case of loss, as there can be no injury to the assured resulting therefrom. *Carroll v. Boston Marine Ins. Co.* 8 Mass. 515. *Gordon v. Massachusetts Mutual Fire & Marine Ins. Co.* 2 Pick. 258. *Wilson v. Hill*, 3 Met. 68. *Macomber v. Cambridge Mutual Fire Ins. Co.* 8 Cush. 133.

It appearing from the facts stated in the case that Pollitz and Codman had before the loss conveyed all their interest in the subject of the insurance to the plaintiff, it is quite obvious that they ceased to have any interest in themselves, that was covered by this policy, for their personal benefit, and no recovery can be had on their behalf.

The further inquiry is, whether the plaintiff has any claim in his own right? As a mere purchaser of the property insured, he acquired in his own right no interest in the policy that had previously existed in favor of his vendors. The claim is of a different character. It is that he holds an assignment of the policy made to his vendor, and is by force thereof a party to the same. The question is not as to the right of the plaintiff to sue in his own name on this policy, for a loss accruing to the property of Pollitz and Codman, if such loss had occurred while they were interested in the same, but whether the newly acquired interest of the plaintiff was insured by force of the acts of these parties.

The policy bears the following indorsement, made June 10th 1850: "Pay under the within policy to Edward Minturn or order. O. W. Pollitz." But this indorsement was a mere order to pay to Minturn any loss that might happen to Pollitz and Codman. It was not an assignment by virtue of which any new party to the insurance was introduced. *Fogg v. Middlesex Mutual Fire Ins. Co.* 10 Cush. 337. *Loring v. Manufacturers' Ins. Co.* 8 Gray, 29, 30. These cases are very full to the point that such an order transfers nothing more than what may be recovered for a loss on the interest of the party originally insured.

But it is said that the fact of the sale of the interest to Minturn being shown by other evidence, and that it was accompanied by an assignment of the policy to the purchaser, and thus made known orally to the insurers, and by them assented to, it establishes a new and original promise to the assignee to indemnify him against his loss, if any occurs. This doctrine has much to sustain it in the elementary books and reported cases, and was assumed by the court as correct in the case of *Wilson v. Hil*, 3 Met. 68.

Without questioning this as applicable to those policies where there is no restrictive clause regulating assignments of policies, and the vesting of new interests in third parties, the present case might be decided upon the stipulations of this particular policy, strict, it may be, but such as the parties have entered into. This policy has on its face, and as a part of the contract, "It is agreed that this policy shall be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers." There is no assent in writing by the insurers to the transfer that was made of the interest of Pollitz and Codman, and the assignment of this policy to Minturn, to secure the new interest thus acquired by his purchase. The only direct assent in writing by the defendants is to the order of Jones & Johnson to "pay under the within policy to O. W. Pollitz or order." The only assent in writing to the order of Pollitz "to pay the within to Edward Minturn," is such as may result from the written acknowledgment of the defendants' having received subsequently an additional premium for delay in getting the vessel to sea, and waiving all objections on account of such delay.

But as regards the evidence of written assent, the objection is the broader one that it is only an assent to the order to pay the loss under the policy upon the interest of Pollitz and Codman. As such it might have been good and sufficient, but it was no written assent to the assignment of the policy to Minturn, as the owner of the goods and interest assured, nor stipulation to make good to him his loss on his property thus purchased.

In the opinion of the court the defence taken upon this point

Lewis & another v. Eagle Insurance Company.

must prevail. The parties have stipulated that the written assent of the insurance company to any assignment or transfer of the policy must be previously given. The rights of the plaintiff to recover must necessarily, after the sale by Pollitz and Codman of all their interest, rest wholly upon the ground of his being a purchaser, with an assignment of the policy. As an assignee claiming under a new interest thus acquired, he should have procured the previous consent of the defendants in writing thereto.

The oral evidence was properly excluded, as by the stipulations of the policy the assent to the assignment was required to be in writing.

Judgment for the defendants.

ABIEL S. LEWIS & another vs. THE EAGLE INSURANCE COMPANY.

The testimony of a witness who declares himself unable to answer questions put to him on cross-examination, on the ground that his memory at times fails him in consequence of mental injury resulting from a sunstroke, and that such is his present condition, is not to be stricken out by the presiding judge, but may be submitted to the jury.

In an action on a policy of insurance for a constructive total loss, if the plaintiff in his claim of loss has given the insurers credit for a certain amount received for salvage, he is not bound to prove that he did not receive more.

A person sent to a foreign port to take charge of a vessel in distress, who ascertains by inquiry the prices of labor and materials necessary to repair vessels there, but has no other knowledge thereof, is not a competent witness on that subject.

In an action on a policy of insurance, under an answer alleging a false and fraudulent representation by the assured of the value of the vessel insured, the defendants may prove a false, though not fraudulent, representation.

ACTION OF CONTRACT upon a policy of insurance on the Schooner *Emeline*, valued therein at \$6000. Trial at March term 1854 before *Bigelow, J.*, who made the following report thereof:

"It appeared that the *Emeline*, while on a voyage during the year, put into Nassau, N. P., in a leaky condition, where the master called two different surveys upon her. The first survey

Lewis & another v. Eagle Insurance Company.

recommended that she should be repaired, and estimated the cost of the needful repairs at \$600. The second survey estimated said repairs at \$6000, and condemned her, and she was sold by the master at auction at said Nassau.

“ The plaintiffs, for the purpose of proving the nature and extent of the injuries which they alleged the vessel had sustained, and the cost of the repairs which they alleged she required, called Elisha W. Gunnison, who testified that he was on the first survey, but had refused to sign the report with the other surveyors. He was examined at great length by the plaintiffs as to the condition of the vessel on her arrival at Nassau, the various injuries which she had sustained, the repairs required, and the cost of each in detail at the said time at Nassau ; and was the only witness produced by the plaintiffs as to the exact cost of the repairs which they alleged the vessel required.

“ After the defendants had commenced their cross-examination of this witness on the subjects above stated, he declared himself unable to answer their questions, and that he had totally forgotten all that he had said on direct examination on this subject ; and stated that he had formerly received a sunstroke, which had impaired his memory, so that at times it was entirely lost, and that he was now in that condition ; but he stated that he was not so affected during his direct examination by the plaintiffs, though he could not now tell what he had said.

“ Upon this evidence the defendants claimed that if this statement was true, the testimony of Gunnison should not be considered by the jury or submitted to them at all, and should be stricken out of the case. But the presiding judge refused to strike it out or to withdraw it from the jury, and ruled that the whole testimony of Gunnison was competent for the consideration of the jury ; and it was submitted to the jury in connection with the other evidence in the cause.

“ The plaintiffs, in their claim for loss, gave credit to the defendants for a certain amount, which they alleged they received from the proceeds of the said Auction sale of said vessel ; but offered no evidence as to the actual amount so received. Whereupon the defendants contended that the plaintiffs were bound

Lewis & another v. Eagle Insurance Company.

to satisfy the jury by proof as to the amount so actually received by them, before they could recover the amount of loss which they claimed.

"But the judge ruled that it was not necessary for the plaintiffs to prove the amount so received by them; and that if there was no evidence in the case bearing on this point, it would be the duty of the jury, if they found for the plaintiffs, to deduct the amount of the credit given by the plaintiffs from the amount which they should find to have been lost by the perils insured against; the burden of proof being on the plaintiffs to prove the amount of the loss.

"The defendants, in order to prove the cost of labor and materials for repairs at said Nassau, called Ebenezer Davis, a shipmaster, who testified that he was sent there to take charge of a vessel which was then in distress; that he then ascertained, by inquiries of shipwrights, material-men and others, what were the prices of certain materials used in repairs and the cost of labor upon vessels; that he had no knowledge of these prices, except what he derived from the statements of others, not having bought or paid for any supplies or repairs in Nassau.

"But upon the plaintiffs' objecting, the presiding judge refused to permit the witness to testify what upon such inquiry he ascertained such cost and prices to be; there being evidence in the case on both sides, from witnesses having actual knowledge of the cost and expense of materials, labor and repairs at Nassau.

"The jury returned a verdict for the plaintiffs for a total loss. If the foregoing rulings, or any of them, are incorrect, the defendants are to be entitled to a new trial."

The defendants also moved for a new trial, on the ground that the verdict was against evidence; and all the testimony was reported for the purpose of determining that question. The arguments and decisions upon these reports were made at November term 1856.

C. G. Loring & E. D. Sohler, for the defendants, to the point that Gunnison's evidence should have been stricken out, cited 2 Phil. Ev. (6th Amer. ed.) 91, & note; *Kissam v. Forrest*, 25 Wend. 651; *Gass v. Stinson*, 3 Sumner, 93; *Cazenove v.*

Lewis & another v. Eagle Insurance Company.

Vaughan, 1 M. & S. 6; and that the testimony of Davis should have been admitted, *Lush v. Druse*, 4 Wend. 313.

R. Choate & I. W. Richardson, for the plaintiffs, to the first point, cited 1 Greenl. Ev. § 365; *Evans v. Hettich*, 7 Wheat. 473; *Depeyster v. Columbian Ins. Co.* 2 Caines, 85; *Clements v. Benjamin*, 12 Johns. 299; *Cazenove v. Vaughan*, 1 M. & S. 4.

BY THE COURT. The questions of law seem to have been rightly decided by the judge who presided at the trial.

1. The evidence of Gunnison was competent, though subject to great doubt as to its credibility. All the testimony that the witness could give was before the court. It is not like a case where the testimony of the witness is left incomplete, as where a witness dies before his examination is finished, as in *Kissam v. Forrest*, 25 Wend. 651, and 7 Hill, 463.

2. The plaintiffs had charge of the vessel, sold what was sold, and were bound to render an account. In the account which they rendered, they gave credit for the salvage. If the defendants were not satisfied, they could interrogate the plaintiffs and demand their accounts, and have an account taken before an auditor. But if they went to trial, it was incumbent on the defendants to show that more salvage had been earned by the plaintiffs than they had accounted for.

3. The evidence of Davis as to what he had heard was properly rejected, as mere hearsay, not verified by oath, nor coming from one who knew the prices at or about the same time by actual dealings.

But upon an examination of all the evidence given at the trial, we are of opinion that there was no competent and sufficient evidence to prove a constructive total loss, so as to warrant an abandonment, and that the verdict therefore, being against evidence, must be set aside, and a *New trial granted.*

A second trial was had at November term 1857, before *Thomas, J.*, who, after a verdict for the plaintiffs, made a report to the full court, so much of which as is material to the understanding of their decision was as follows:

The defendants in their answer alleged that "the said vessel

Lewis & another v. Eagle Insurance Company.

was valued by the plaintiffs to them at the time when said policy was made, and represented by the plaintiffs to the defendants to be of the value of six thousand dollars, and upon the faith of such valuing and representations the defendants executed the said policy wherein said vessel is valued at six thousand dollars; and the defendants say that the same was a gross and fraudulent overvaluation of said vessel by the said plaintiffs;" and further alleged that "they were induced to make the policy declared upon by the fraudulent representations of the plaintiff W. G. Lewis, who represented to the defendants, in order to obtain said insurance of six thousand dollars, that he had paid five thousand dollars for the said vessel, or she cost five thousand dollars, and that he had laid out one thousand dollars on her, whereas the said vessel was bought by him for two thousand one hundred and fifty dollars."

The defendants offered evidence tending to prove the allegations in the answer. And the presiding judge instructed the jury as follows:

"If, upon the evidence, the jury find an overvaluation, fraudulently made on the part of the assured or his agent, with the intent of destroying the property, and of recovering from the insurers the amount for which it is so valued, such a fraudulent purpose would render the contract void.

"The law requires of the parties to a policy of insurance the exercise of good faith. A misrepresentation is a false representation of a material fact by one of the parties, tending directly to induce the other to enter into the contract. This principle, applicable to all contracts, is peculiarly applicable to a policy of insurance, which is ordinarily made upon the statements and representations of the assured. A representation of what a vessel cost, or what was paid for it, is a representation as to a material fact; and if the plaintiffs, in effecting this policy, fraudulently, and in order to obtain the insurance, represented that the vessel cost \$5000 and \$1000 for coppering, when, in point of fact, the entire cost was \$3150, it was a misrepresentation upon a material point, which, if false, would avoid the policy.

"But this question is to be tried upon the exact answer filed

Lewis & another v. Eagle Insurance Company.

by the defendants; and that answer, as made, requires proof that the representation was fraudulent, as well as false, and, in point of fact, induced the defendants to make the contract; that the defendants had taken this burden on themselves; and that the burden in this matter was on the defendants."

Sohier & C. W. Loring, for the defendants.

Choate & Richardson, for the plaintiffs.

MERRICK, J. The representation made by the plaintiffs, upon obtaining insurance upon their vessel, that it cost them five thousand dollars and one thousand more for coppering, was of and concerning facts material to be known by the underwriters; and, if false, avoided the policy which they had issued, and relieved them from all liability thereon. Upon this point the instructions given to the jury were correct. But the instructions went further than this; and it was ruled that, upon the exact answer filed by the defendants, they must prove, in order to avoid the policy, not only that the representation made by the plaintiffs was false, but that it was also fraudulent. This, we think, would necessarily have been understood by the jury as importing that the alleged fraud was a distinct subject of inquiry, not to be deduced from the mere proof of the false representation relative to the cost of the vessel; and that unless this fraud was established by other evidence, they would not be warranted in finding a verdict for the defendants. There is nothing in their answer, which imposes upon the defendants the burden of proving this fact, in addition to the fact of a false representation, in order to maintain their defence. It is true that they allege in general terms that the representation of which they complain was falsely and fraudulently made. But whether this representation was designedly and intentionally erroneous, and made with the corrupt purpose of gaining an undue advantage or not, is immaterial in relation to the question at issue between the parties; for if it was false, it clearly exonerated the defendants from the performance of the contract on their part, and wholly avoided the policy. It is unnecessary to multiply citations in support of this position, because, as is remarked by Mr. Phillips in his treatise on insurance, the doctrine is con

Leeds, Executor, v. Wakefield & others.

stantly assumed, and runs through the whole jurisprudence on the subject, that material representations having reference to past or existing circumstances discharge the underwriters from all liability in respect of the risks to which they relate. 1 Phil. Ins. §§ 537, 677. *Elton v. Larkins*, 5 Car. & P. 385. The ruling of the court therefore, which required the defendants to produce proof of the fraudulent character, as well as of the falsity, of the plaintiffs' representations concerning the cost of their vessel, in order to sustain their defence, must be held to have been erroneous; and for this cause only, as the instructions which were given to the jury appear in all other particulars to have been unexceptionable, the verdict for the plaintiffs must be set aside, and a

New trial granted.

A third trial was had at November term 1858 and resulted in a verdict for the plaintiffs for a partial loss.

JAMES LEEDS, Executor, vs. CYRUS WAKEFIELD & others.

The execution of a power, affected by a trust for the benefit of children and their issue, to which the consent of a majority of the children living at the time of executing it is made necessary by the will creating the power, is valid in equity without such consent, if the children are all dead at that time.

A testator, who left a wife, three sons and a daughter, devised the rents and profits of real estate to his wife during her life, and, in case she should die before all his children should be of age, directed his executor to take possession of the estate and, as long as any of the children should be under age, appropriate the income to their support, "and as soon as all my said children shall have come of age (their mother being dead) my said executor shall proceed to sell and dispose of my said estates, consulting and advising however with my said children, and not selling unless the consent of a majority of my said children then living shall be obtained in writing to the said sale," and distribute the proceeds among the four children equally, giving the share of any child who should be dead to its lawful issue, or, if there should be no such issue, to the surviving children, equally; and further, if the wife should not die till all the children should be of age, take possession of the estate and proceed to sell it "in the same way and under the same limitations, and distribute the proceeds thereof in the same manner as is above provided in the case of my wife's dying before all my children shall have come of age."

Leeds, Executor, v. Wakefield & others.

All the children came of age and died in the wife's lifetime; all without issue, except one son, who left a child; the daughter conveyed her interest before her death; at the widow's death, the executor sold the real estate. *Held*, that the daughter's interest was either contingent, or, if vested, was devested by the execution of the power, and in either case her grantee had no interest in the proceeds of the sale.

BILL IN EQUITY, in the nature of a bill of interpleader, filed by the executor and trustee under the will of John Howe, the material provisions of which were as follows :

1st. A devise of the rents and profits of certain real estate to his wife for life, charged with the maintenance of his three sons during minority, and of his daughter while unmarried.

2d. " If my said wife should die before all my children shall have arrived at lawful age, then it is my will that my executor shall take possession of my real estates, and receive the rents and income thereof as long as any of my children shall remain under age, and shall appropriate the said income, or so much thereof as may be needed for that purpose, to the support and maintenance of such minor child or children, and when all my said children shall be of age, if there remains any balance unexpended of said rents and profits in my executor's hands, he shall distribute it equally among my said children ; and as soon as all my said children shall have come of age (their mother being dead) my said executor shall proceed, as soon as he conveniently can, to sell and dispose of my said estates for the best price he can obtain, consulting and advising however with my said children, and not selling unless the consent of a majority of my said children then living shall be obtained in writing to the said sale ;" and the proceeds of the sale, together with any unexpended income, shall be distributed equally among the four children, giving the share of any child, who shall be dead, to its lawful issue, or, if there shall be no such issue, to the surviving children equally.

3d. " If my wife shall not decease until after all my children shall have come of age, then it is my will that immediately upon the decease of my wife my said executor shall enter into and take possession of my said estates, and shall proceed to sell and dispose of the same in the same way, and under the same limitations, and shall distribute the proceeds thereof in the same

Leeds, Executor, v. Wakefield & others.

manner, as is above provided in the case of my wife's dying before all my children shall have come of age."

The testator's widow and four children all survived his death and the coming of age of the youngest child. Then two of the sons died, without issue. The daughter, Ann Howe, conveyed her interest in the estate to Cyrus Wakefield, in trust, first for herself and children, and then for Enoch H. Wakefield, whom she soon after married; and died without issue. The surviving son, George, died, leaving issue a minor daughter, Ann M. Howe. And then the widow died. The executor sold the estate, under a resolve of the legislature, and an agreement that the sale should not affect the rights of the parties; and held the proceeds for distribution.

The granddaughter, as the sole heir of the only one of the testator's children who left issue, claimed by her guardian the whole of the proceeds. The Wakefields claimed a portion under the conveyance from the testator's daughter.

A. A. Ranney & N. Morse, for the plaintiff and the granddaughter.

E. R. Hoar & H. Gray, Jr. for the Wakefields. The estate vested in all the testator's heirs equally, except so far as the will otherwise provided. The devise to the widow for life did not affect the estates of the heirs upon her decease.

The second provision of the will, whether it would give the executor a mere power, or an estate by implication, was to take effect only upon the contingency, which never happened, of the death of the widow before all the children should come of age.

The third provision of the will, being a mere direction to the executor to sell and to distribute the proceeds, gave him a power merely, and no estate; and left the estate in the heirs, subject only to be divested upon a lawful execution of the power. *Greenough v. Welles*, 10 Cush. 577. 4 Kent Com. (6th ed.) 320, & authorities cited. Where, by the terms of an instrument creating a power, the consent of particular persons, either named or described, is required, their consent must be obtained; and after their death the power cannot be executed. Sugd. Pow. (1st Amer. ed.) 211, 212, 264. Pow. Dev. 296. 2 Prest. Abstr.

Leeds, Executor, v. Wakefield & others.

Tit. 263. *Danne v. Annas*, Dyer, 219 a. *Butler v. Bray*, Benl. 82; Dyer, 189 b; approved in Godb. 77, 1 Leon. 74, and Wilmot, 56. *Atwaters v. Birt*, Cro. Eliz. 856. *Mansell v. Mansell*, Wilmot, 53-56. The words of a power are to receive a reasonable construction; but, so construed, must be strictly complied with. It is in accordance with this rule, that a power, given to three or more generally, and not by name — as to “my trustees,” “my sons in law” — has been held to survive while the plural number remains. Sugd. Pow. 165, approved by Wilde, J. in *Tainter v. Clark*, 13 Met. 225, 226.

The clause in this will, requiring the executor to advise with the children before selling, would of itself prevent him from executing the power after their death. *Frankelen's case*, cited by Dyer in Mo. pl. 172. But he is also in terms prohibited from selling “unless the consent of a majority of my said children then living shall be obtained in writing to the said sale.” These words cannot fairly be taken to limit the previous clause further than to make the assent of a majority equivalent to unanimous assent; indeed the very word “majority” implies the existence of somebody, if not of more than one. The court cannot, after “children then living,” add “if any shall be then living.” The testator's intent appears to have been that a sale of the estate, which might under his will occasion a change in the division of his property, should not be made without the consent of some of his own children.

SHAW, C. J. The power given to the executor to sell and dispose of the real estate, upon the decease of the widow, after the children had all come of age, and to distribute the proceeds of the sale amongst the children then surviving, putting the issue of any deceased child in place of such child for the purpose of distribution, was a power coupled with a trust, which trust could only be carried into effect by first executing the power, so that the trust affects the proceeds, when thus raised by the execution of the power, by the sale of the estate. *Greenough v. Welles*, 10 Cush. 576.

As a general rule, one clothed with a mere naked power may execute the power or not, at his own will; but one invested

Leeds, Executor, v. Wakefield & others.

with a power to which a trust is annexed is bound in equity, as in other cases of trust, to execute the power, in order that the equitable rights of those who are stated as the objects of the testator's bounty under such trusts, may have the enjoyment of the benefits intended for them. Sugd. Pow. 394. And so far will a court of equity regard the rights of such objects of the testator's bounty, that, when the donee of the power has from any cause failed to execute it, and thereby give direct effect to the trust, in regard to the proceeds of the sale, a court of equity will require the party in whom the estate is vested to join in a sale of the estate, in order to give effect to the trusts dependent thereon. *Gibbs v. Marsh*, 2 Met. 251. And when a power is thus coupled with a trust, it is the duty of the donee to execute it as required by the will; and a court of equity will not permit any accident, neglect of the donee, or other cause, to disappoint the interest of those who are entitled to the contemplated benefits under it.

But it is not necessary to inquire what would have been the rights of the beneficiaries in case the original donee of the power, the executor, had elected not to execute it, or had neglected to do so, or had died before executing it; because the executor as such donee of the power has survived the widow and all the children, and is not only ready and willing to execute the power but has executed it, by selling the estate, and he now holds the proceeds subject to the trusts of the will, and brings this bill, in the nature of a bill of interpleader, that the conflicting claimants of these proceeds may contest their relative claims and obtain a decree of this court directing him how to pay it over.

The foregoing considerations as to what would have been the rights of the parties, in case the power had not been executed, are important only as illustrating the nature and extent of the rights of the beneficiaries under such trust power, and the manner in which they are regarded in a court of equity, as extending to and affecting the real estate, out of the sale of which, under the power, such equitable rights arise.

The only ground on which any doubt would seem to arise in this case is, that the power of sale was made conditional on the

Leeds, Executor, v. Wakefield & others.

consent in writing by the children. The purpose of the testator, we think, was to make a disposition of his whole estate; and the mode was by ordering his executor to sell, as soon as all the children should come of age and the widow decease; should she die before the youngest child was of age, the sale might then be postponed till the latter contingency should happen; it was then to be made. There might therefore be a case in which the sale should be made, when all or some of the children should be living and of age, and then it was the intent of the testator that such consent should be obtained. But if, on the decease of the widow, there were no children surviving, no children then living, there was no apparent purpose which could have affected the mind of the testator, to prohibit a sale, when such consent of children had become alike unnecessary to protect their interests, and impossible; we think the condition was annulled by the event of all the children dying, and therefore that the power became thereby unconditional.

Whether this would be the case with respect to a mere naked power, the right execution of which depends upon a strict compliance with all the terms on which it is given, or not, we have no doubt that it applies to a trust power, where the execution of the power is obviously a means only of carrying into effect the ultimate object of the testator, in providing for the benefits specially designated for the declared objects of his bounty.

A subsequent clause of the will directs that if the wife shall not decease until all the children have come of age, then it shall be the duty of the executor, immediately on the decease of the wife, to enter upon and sell the estates, and to proceed in the same way and under the same limitations, and to distribute the proceeds in the same manner. This, we think, applies to the actual state of things as it should exist; if children then survived, they were to be consulted, and their consent in writing obtained; otherwise, being impossible, the sale was to be made without such consent.

How then does the execution of the power affect the interest of the respondents Wakefield and Wakefield, either in the real estate, or in the proceeds thereof in the hands of the executor?

Leeds, Executor, v. Wakefield & others.

Had there been a residuary clause in this will, the legal estate, after the devise to the wife for life, would have vested in such residuary devisee in fee; but such legal estate would have so vested in him, 1. even if the power of sale were a naked power, subject to be divested upon a due and legal execution of the power of sale, by which it should be sold to a third party, to hold in fee; and 2. if it was a trust power, then subject to the trust thereby created, which would reach and affect the estate, even if there had not been a precise and exact legal execution of the power by a completion of such execution in equity.

But in the present case there was a strict execution of the power, by the original donee, by which, had the legal estate vested in a residuary devisee, it was divested and wholly defeated. It is unnecessary to discuss the question whether Ann Howe, when she executed her deed to Wakefield, had a vested or contingent interest in the estate; if contingent, it was dependent on the event of her surviving her mother, whom she did not survive, and so it never became vested; but, if vested, it became divested by the due execution of a power of sale created by the same will under which she derived her legal estate. *Cowdin v. Perry*, 11 Pick. 509. As there was no residuary clause in this will, or other devise over, after the decease of the wife, the children took the legal estate as heirs at law; but their legal interest would be regarded as a reversion, subject to be defeated by the right execution of a power given by the ancestor by his will, and subject to any trust affecting the estate in equity, in the same manner as if they held by way of remainder.

We are therefore of opinion, that whatever legal estate Ann Howe had in the remainder or reversion expectant on the termination of the life estate of the mother, it was either a contingent interest, and was determined by her decease in the lifetime of her mother; or, if vested, it was defeated by the due execution of the power of sale by the executor; and, in either event, her grantee has no interest in the proceeds of the sale of the estate by the executor; but Ann M. Howe, the minor, being the only child and heir of George Howe, who was the only child of the testator who left issue, is entitled by the terms of his will to the net proceeds of such sale *Decree accordingly.*

SETH ADAMS vs. BOSTON WHARF COMPANY.

General rules for the division of flats among coterminous proprietors of land bounding on the seashore must yield to lines established by a partition affirmed by the court, and acquiesced in by the parties for thirty five years.

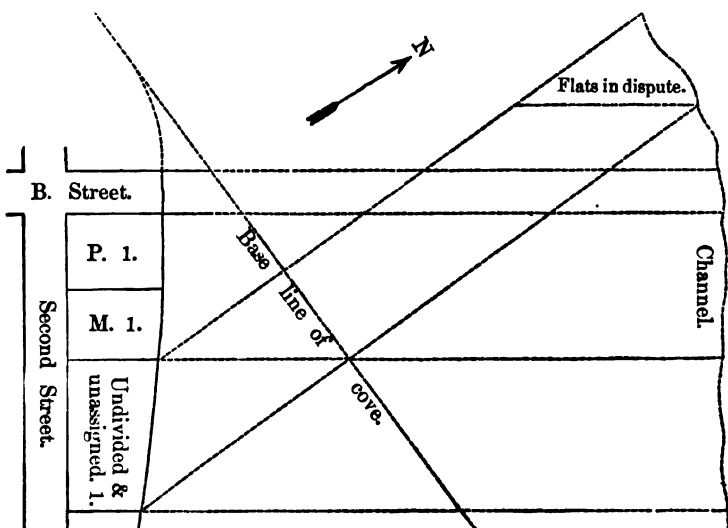
Commissioners of partition of land bounded southwesterly on Second Street, northwesterly on B Street, and northeasterly "by the sea," made a return, of which a plan was made part whereon B Street was extended upon the flats at right angles with Second Street: and set off to P. a lot, beginning at the corner of said streets, and bounded southwesterly on Second Street for a certain distance, "then turning at right angles and bounding on land hereinafter assigned to M., and running northeasterly to low water mark, then running northwesterly as the channel runs to B Street, then by B Street as that runs to the corner begun at:" They set off to M. the next lot to the east of this, bounded southwesterly by Second Street a certain distance, "then turning at right angles and running northeasterly to low water mark, then turning again and running by the channel to land and flats hereinbefore set off to P., then turning again and running southwesterly along said land of P. to Second Street:" They left "undivided and unassigned" to G., the respondent in partition, the next lot eastwardly: And their return was accepted by the court, and acquiesced in by the parties for thirty five years. *Held*, that G. had no title in flats westerly of B Street, although independently of the partition they would have come within the lines, as established by the court, of the estate thus divided; or that if he had, no title in flats westerly of B Street was conveyed by a subsequent deed from him, of "a certain piece or parcel of land and flats," bounded southerly on Second Street, beginning at the land of M., and running easterly on said Second Street a certain distance, "then turning at a right angle and running northerly on other land of G. as far as his land extends, then beginning again at the first mentioned point and running northerly on land of M. and parallel to B Street as far as the land of G. extends; it being the intention of this instrument to convey" a certain amount "of upland, together with all the flats to said land belonging, running out as far as G. has a right to go, but without warranty as to the courses of the side lines over said flats; but meaning hereby to sell and convey said upland as above described, together with all the flats to said G. belonging, situated on the westerly side of a line beginning at the southeasterly corner of the granted land on Second Street, and running northerly at right angles with Second Street."

WRIT OF ENTRY to recover a parcel of flats on the cove on the northerly shore of South Boston. Plea, nul disseisin. Trial before the chief justice, who directed a nonsuit, subject to the opinion of the whole court upon the following case:

The demandant contended that these flats were appurtenant to a tract of upland of about fifteen acres, southeast of B Street, formerly belonging to Jonathan Bird, but which in 1809 was owned in common by Thomas H. Perkins, Jonathan Mason, Harriet J. Gardner, (afterwards Mrs. Denny,) and others; and

Adams v. Boston Wharf Company.

gave in evidence a petition to this court in that year of all said tenants in common except Harriet J. Gardner, for a partition of this tract of land; a warrant issued thereupon to commissioners to make partition thereof, and their return of the "partition of said piece or parcel of land, described as bounded "by the sea on the northeast; in the manner following, which is faithfully and impartially done, according to our best skill and judgment, always referring to the annexed plan of the same land, taken by Mather Withington, surveyor, and dated Dorchester, January tenth A. D. 1810, which plan is to be considered as part of this return." The following plan (except the dotted lines, which indicate the division lines contended for by each party,) is taken from said plan of Withington.



The return of the commissioners was accepted by this court at March term 1810, and so much of it as is material to the understanding of this case is as follows:

"The first piece of land so set off and assigned unto said Perkins is marked P. 1 on said plan, and is bounded and measures as follows, viz: Beginning at the northeasterly corner of Second Street and B Street, and is bounded southwesterly on Second Street, running eighty two feet and one half from said corner;

then at the distance of eighty two feet six inches from said corner turning at right angles, and bounding on land hereinafter set forth and assigned unto Jonathan Mason, Esquire, and runs northeasterly from said Second Street to low water mark; then runs northwesterly as the channel runs to the said B Street; then is bounded by said B Street, as that runs up to the aforesaid corner begun at."

"The first piece of land so assigned and set off to said Jonathan Mason is marked M. 1 on said plan, and is bounded and measures as follows: southwesterly by Second Street, measuring thereon eighty two feet six inches from a point thereon, which is eighty two feet and a half from the corner of B Street; then at the distance of one hundred and sixty five feet from the corner of B Street, turning at right angles and running northeasterly to low water mark; then turning again and running by the margin of the channel northwesterly to land and flats hereinbefore set off to Thomas Perkins, marked P. 1 on said plan; then turns again and runs southwesterly along said land of said Perkins to Second Street aforesaid, striking the same at said point eighty two and a half feet from said corner of B Street."

To each of the other petitioners for partition was assigned a "piece of land," "bounded southwesterly by Third Street" a certain distance, "and preserving the same width, runs from said Third Street to low water mark, both sides of Second Street and First Street, excepting thereout the land covered by said Second Street and First Street, northeasterly by the channel." The most northwesterly of these lots was assigned to Helena Augusta Gardner, and described as bounded "northwesterly by land undivided and unassigned;" and the most southeasterly, which was assigned to Moses Everett, was described as bounded "southeasterly by C. Street."

"Having thus set off, assigned and divided, unto each of the petitioners named in said petition respectively, a portion of the said land described in said petition, equivalent to the particular and respective undivided proportion, and part belonging to each petitioner, as set forth in the said petition, we have left, undivided and unassigned, ten thirtieth parts thereof, owned as fol-

Adams v. Boston Wharf Company.

lows, and as stated in said petition, to wit: the said Moses Everett is tenant thereof by curtesy, and the remainder in fee is in Joanna Harriet Gardner; and the land thus left undivided is in four lots, marked on said plan, undivided and unassigned, 1, 2, 3, 4."

The lots thus set off to Perkins and Mason afterwards came by successive conveyances to Thomas Cains.

The demandant also gave in evidence a deed, dated March 1st 1845, with the usual covenants of seisin and warranty and against incumbrances, to himself from Daniel Denny and his wife Harriet J. G. Denny, (who is the Joanna Harriet Gardner mentioned in the above return,) in her right, of "a certain piece or parcel of land and flats, situated in that part of said Boston called South Boston, and bounded and described as follows, to wit: Bounded southerly on Second Street, beginning at a point on said Second Street, at the distance of one hundred and sixty five feet easterly from B Street, at the line of land of Thomas Cains; thence running easterly on said Second Street one hundred and sixty five feet; then turning at a right angle and running northerly on other land of said Harriet J. G. Denny as far as her land extends; then beginning again at the first mentioned point, and running northerly on land of said Cains and parallel to B Street as far as the land of said Harriet J. G. Denny extends; it being the intention of this instrument to convey to said Adams about eleven thousand six hundred and twenty two square feet of upland, as marked and laid down on a plan which is recorded with Suffolk deeds, at the end of Book 232, together with all the flats to said land belonging, running out as far as the said Harriet J. G. Denny has a right to go, but without warranty as to the courses of the side lines over said flats; but meaning hereby to sell and convey said upland as above described, together with all the flats to said Harriet J. G. Denny belonging, situated on the westerly side of a line beginning at a point on Second Street three hundred and thirty feet easterly from B. Street, and running northerly at right angles with Second Street."

"It was agreed that the lot of upland aforesaid is bounded on

the same cove in which are the flats, the subject of controversy in the suit of *Gray v. Deluce*, 5 Cush. 9; that the tide in this cove ebbs more than one hundred rods; and that the easterly side line of the flats appurtenant to the aforesaid lot of upland divided by said partition, extended according to the rule applied by the court in the decision of that case, would intersect B Street, mentioned in the aforesaid return of said commissioners, at a point less than one hundred rods distant from high water mark. The parcel of flats demanded is on the westerly side of said B Street, and is part of the flats appurtenant to the lot of upland aforesaid, providing the westerly side line thereof be extended agreeably to the rule applied as aforesaid in the case of *Gray v. Deluce*."

This case was argued at November term 1857.

H. W. Paine & C. W. Loring, for the demandant. The demandant's upland is part of that "left undivided and unasigned" to his grantor in the partition of the Bird estate. The boundary of that estate "by the sea on the northeast" included all the flats by law appurtenant to it. *Jackson v. Boston & Worcester Railroad*, 1 Cush. 578. *Saltonstall v. Long Wharf*, 7 Cush. 200. The rule established by this court for the division of flats in this cove is to draw straight lines from the two shore corners of the upland, perpendicularly to a base line extended across the cove. *Gray v. Deluce*, 5 Cush. 9. And it is admitted that by that rule the flats demanded would belong to the demandant's upland.

The warrant to the commissioners to make partition required them to divide the whole estate, the flats as well as the upland. *St. 1783, c. 41. Partridge v. Luce*, 36 Maine, 16. Their return shows that they intended to divide the whole estate; to assign to each proprietor of the shore a parcel of flats in proportion to his upland and of uniform width throughout; and to give to each access to the sea. All these purposes can be effected by so deflecting the side lines of the shore lots, at the line of high water, that they shall be perpendicular to a base line drawn across the cove from headland to headland; and they can be effected in no other way.

The courses indicated and the boundary on B Street, being repugnant to the general intent, to the legal title in the flats, and to the monuments of "low water mark," and "the channel," must be rejected. *Curtis v. Francis*, 9 Cush. 427. *Thatcher v. Howland*, 2 Met. 41. *Foss v. Crisp*, 20 Pick. 121. *Bosworth v. Sturtevant*, 2 Cush. 392. *Keith v. Reynolds*, 3 Greenl. 393. *Witham v. Cutts*, 4 Greenl. 31. *Bucknam v. Bucknam*, 3 Fairf. 463. *Pike v. Moore*, 36 Maine, 309. *White v. Gay*, 9 N. H. 126. *Gates v. Lewis*, 7 Verm. 511. *M'Ivers v. Walker*, 9 Cranch, 173. *Jackson v. Carey*, 2 Johns. Cas. 350. *Colclough v. Richardson*, 1 McCord, 167.

If the divisional lines cannot be deflected, all the flats appurtenant to the Bird estate and lying west of B Street, not being assigned to either of the petitioners, vested in severalty in the demandant's grantor as the sole respondent in partition; or, if limited in this respect by the specific enumeration of the parcels designed for her, she remained tenant in common of one third; and whatever her interest was, it passed by her subsequent deed to the demandant, and may be recovered in this action. *Foss v. Crisp*, 20 Pick. 121. *Marr v. Hobson*, 22 Maine, 321.

That deed, after describing the granted premises as both "land and flats" in South Boston; giving the metes and bounds of the upland only, and declaring the grantor's intention to convey "all the flats to said land belonging;" and excluding any warranty as to the courses of the side lines over said flats; further declares an intention to convey "all the flats to said Harriet," not merely to said land, "belonging, situated on the westerly side of a line" clearly defined. This last description is sufficiently definite to pass all the flats owned by the grantor in South Boston, west of the specified line. *Ward v. Bartholomew*, 6 Pick. 409. And it is difficult to imagine any other reason for adding this clause, than that the grantor was in doubt where her flats in that cove were, but intended to convey them, wherever they were, if west of that line.

H. F. Durant & A. C. Washburn, for the tenants.

MERRICK, J. The demanded premises consist of a parcel of flats lying westerly of B Street in South Boston. Two ques-

tions arise upon the facts reported by the judge who presided at the trial: first, whether the demanded premises, at the time of the conveyance from Mr. and Mrs. Denny, belonged to her; and, secondly, if they did, whether they were included in the description in that deed and passed by it to the demandant.

It appears from the report and the plan accompanying it, that the upland conveyed by said deed to the demandant was a part of a parcel of land known as the Bird lot; and that the Bird lot was a small part of the tract of land or territory which was formerly included within the limits of the town of Dorchester, and which by the statute passed March 6th 1804 was annexed to the then town of Boston. *St. 1803, c. 111.* The Bird lot was then owned by said Harriet and others as tenants in common, and the whole of it, together with other land lying both to the east and west of it and owned by other persons, was bounded upon the cove which is mentioned and described in the case of *Gray v. Deluce*, as reported in 5 Cush. 9. All those owners were entitled under the ordinance of 1647 to their proportions respectively of the flats adjoining the upland which belonged to them. *Commonwealth v. Alger*, 7 Cush. 67. And it is admitted by the tenants that upon a division of the flats within the cove, according to the rule established by the decision in the above named case of *Gray v. Deluce*, the demanded premises would be appurtenant to the tract of upland conveyed to the demandant, and would therefore in such case belong to him. It is upon the application and enforcement of this rule that he insists that his action to recover possession of it may be maintained.

But it is obvious that the only effect of the ordinance of 1647 is to transfer the title to the flats from the State to the owner of the adjoining upland. The land of which they consist is real estate, and of course subject to all the laws by which that species of property is held, controlled and regulated. It may be improved, sold, divided, and conveyed in separate and distinct parcels, like any other land, at the pleasure of the owner; and consequently the several owners of upland bounded on the sea have the right and power, by proper legal instruments and conveyances, to establish such lines of division between their

Adams v. Boston Wharf Company.

respective portions of the flats as they may find to be for their mutual advantage. The tenants contend that, in the exercise of this right, the proprietors of the upland bordering upon the part of the cove in question did, long before the conveyance to the demandant, make a division of the flats to which they were severally entitled, and established the boundaries of their respective shares, so that their title thereto was no longer to be ascertained by applying the rule laid down in the case of *Gray v. Deluce*. They produce no deeds of such partition; but they rely upon proof of facts and circumstances from which they insist that such deeds, or grants to such effect, must be presumed to have been duly made and executed.

By the *St.* of 1803, c. 111, a large territory, consisting in part of lands belonging to many different owners, and bordering upon the sea, was annexed to the town of Boston; and the selectmen were authorized to lay out such streets and lanes through the whole of said territory, as in their judgment would be for the common benefit of the town and of the proprietors of the land. In the discharge of this duty, they were enjoined to pay reasonable attention to the wishes of the proprietors; but no compensation was to be made to the owners for lands taken for such purposes, nor were the streets to be completed sooner than the officers of the town should deem it expedient to do so. In pursuance of the authority thus conferred upon them, the selectmen did on the 27th of February in the ensuing year, having first conferred with the proprietors on the subject, lay out streets over all parts of the common territory, according to a plan drawn by Mather Withington. *Wright v. Tukey*, 3 Cush. 290. *Henshaw v. Hunting*, 1 Gray, 202. This location was obviously the result of a mutual agreement between the officers of the town and the proprietors of all the lands over which it extended, and indicates, certainly to some extent, the views and purposes of the latter in relation to the division, partition and appropriation of their respective estates.

Five years afterwards all the tenants in common of the Bird lot, except Harriet J. G. Denny, instituted legal proceedings for its partition. The report of the commissioners making the

division, in pursuance of an adjudication to that effect, was returned into court in April 1810, and was there accepted and entered of record. From the whole of this report the implication is of the strongest kind, that none of the petitioners at that time made any claim or set up any title to any land or flats lying westerly of the line of B Street; but on the contrary that they did expressly claim all the flats adjoining their upland, included within lines drawn from points at the exterior limits on the shore, parallel to B and C Streets, and carried out to low water mark. And the partition was made accordingly. The commissioners, recognizing the location of streets in South Boston made by the selectmen in 1804, as delineated on the plan of Mather Withington of that year, make a subsequent plan by the same surveyor, corresponding with that one, a part of their description of the several lots set out in severalty to the tenants in common of the Bird lot. All the streets which extended to the sea were, in express terms contained in the location made by the selectmen, continued upon the flats into the sea as far as the right of the several proprietors extended; that is, to low water mark. *Henshaw v. Hunting*, 1 Gray, 206. And each of the lots bounded on the cove were in like manner, in the partition made by the commissioners, continued to the same line. Thus the first lot, which was assigned to Perkins, was bounded on the one side by B Street, and on the other by a line drawn from a point on Second Street eighty two and one half feet distant from B Street and parallel to it to low water mark. The next adjoining lot was assigned to Mason, and was bounded by Second Street, by low water mark, and by lines parallel to B Street. All the other lots assigned to several petitioners tenants in common, were described as bounded by like parallel lines. This whole partition was therefore necessarily predicated upon the assumption that the owners of the Bird lot had no interest in, or right to, any of the flats situated westerly of B Street. The report of the commissioners making this partition having been returned into court and duly accepted, the judgment rendered upon it is conclusive upon all the parties to it.

It appears that Perkins and Mason subsequently made convey-

ances of the two lots assigned to them, bounding on the cove; and that by intermediate conveyances these lots became the property of Cains, who was the owner of them in 1845, when Mr. and Mrs. Denny made their deed to the demandant. All the other tenants, who were parties to the legal proceedings, as far as anything is known upon the subject, acquiesced in the division, and it is not shown, nor does it in any way appear, that either Mrs. Denny, who was the sole respondent in that case, or the owners of the land west of B Street, ever made any objection, or set up any claim in opposition to or inconsistent with it. This uniform acquiescence in the partition, for a period of at least thirty five years, by all parties interested in the Bird estate, and the positive action in conformity to it by some of them, without any resistance or objection made to it by proprietors of the adjoining upland, would seem to be amply sufficient to justify the presumption that before it was made the several proprietors of the flats lying within that part of the cove had, by proper instruments of release and quitclaim, established B Street as the boundary and line of division between the land of the owners of the Bird lot on the one side and the owners of the upland lot adjoining it on the west. And giving the just legal effect to this presumption, it becomes apparent that the rule established by the decision in the case of *Gray v. Deluce* is no longer to be resorted to, in order to ascertain the rights of the parties; but they are all bound by the convention into which it is to be considered that they have voluntarily entered. In this view, it is also apparent that no part of the flats west of B Street belonged to Mrs. Denny when she made her deed to the demandant, and consequently that the demanded premises could not have been conveyed to him by it.

But whatever may be assumed to have been her right or interest in the flats west of B Street, whether as tenant in common or as sole owner, in consequence of that land having been left undivided under the proceedings for partition, it is very clear, upon a proper construction of the deed, that the demandant acquired no title thereby to any portion of it. The deed purports to convey but one single parcel of land. It is de-

scribed as "a certain piece of land and flats," bounded on the west by the land of Cains, and by a line parallel to B Street and at the distance of one hundred and sixty five feet from it, and by certain clearly designated lines on its other sides. This description is exact, and applies in explicit terms as well to the flats as to the upland. The true meaning of the further expression "all the flats to said land belonging," is, that the flats are contiguous and attached to the upland, the whole constituting one entire and compact parcel. Nor is the grant enlarged by the further recital in the deed, that the grantors, without intending to enter into any covenants of warranty as to the courses of the side lines over the flats, meant to sell and convey the described upland "together with all the flats to said Harriet J. G. Denny belonging, situated on the westerly side of a line beginning at a point on Second Street three hundred and thirty feet easterly from B. Street, and running northerly at right angles with Second Street." The only effect of this additional description is to assure to the grantor all the right and interest which Mrs. Denny acquired by means of the proceeding under the petition of the other tenants in common for partition. That is, that the grantors meant to convey all the flats within the parallelogram between the land of Cains, originally set off to Mason, on the one side, and the land set off to Helena Augusta Gardner on the other, if by means of the partition Mrs. Denny acquired a title thereto; but that they would not assume the responsibility of warranting that she did thereby acquire a title to the whole of it. It follows as a necessary consequence that the demanded premises, being in no part contiguous to or connected with the particular "piece or parcel of land and flats" described in the deed, but separated from it by the intervening parcels set off and assigned in severalty to Perkins and Mason, which were subsequently conveyed to Cains, were not included in the description contained in the deed of the estate sold, and did not therefore pass by it to the demandant.

On both grounds therefore he fails to show that he is entitled to maintain his action; and the nonsuit ordered must be affirmed, and

Judgment entered for the tenants.

PRESIDENT, DIRECTORS & COMPANY OF THE ATLANTIC BANK vs.
PRESIDENT, DIRECTORS & COMPANY OF THE MERCHANTS' BANK.

By a fraudulent conspiracy between the paying teller of the Merchants' Bank, the teller of the Atlantic Bank, and a broker, the broker drew a check on the Merchants' Bank, where he had no funds, which the paying teller marked "good," and the broker took it to the teller of the Atlantic Bank, who gave him the money for it in current bills, partly on the Atlantic Bank and partly on other banks. The broker took these to the Merchants' Bank, and gave them to the paying teller, who, for the purpose of covering a deficit, unknown to any other of the bank officers, in his cash, which was to be counted that afternoon, placed them with it. The purpose for which the money was obtained was known to the two other parties, but no other officer of either bank knew anything of the transaction. The paying teller's cash was produced by the cashier to the directors, and counted by them that afternoon, approved and returned to him. The next morning he committed suicide, the check was presented at the Merchants' Bank and payment refused. *Held*, that the Merchants' Bank could not hold the money as against the Atlantic Bank, and were liable to the latter, after demand, in an action for money had and received. BIGELOW and MERRICK, JJ. dissenting.

ACTION OF CONTRACT to recover \$25,000, as money had and received by the defendants to the plaintiffs' use on the 26th of March 1855, with interest. Writ dated May 3d 1855. Answer, that the defendants never received the money, and did not owe it or any part of it to the plaintiffs.

At the trial before *Bigelow*, J. it appeared that the sum sought to be recovered was taken from the Atlantic Bank, by a fraudulent conspiracy between Richard Ward, teller of that bank, Thomas W. Hooper, paying teller of the Merchants' Bank, and Augustus S. Peabody, a broker, to cover a deficit in Hooper's cash, which was about to be counted, and was used by Hooper for that purpose; and that before it was returned Hooper committed suicide.

Peabody testified as follows: "I was a stock and exchange broker in Boston from 1845 till September 1855. On Monday, the 26th of March 1855, I drew a check on the Merchants' Bank for \$25,000, and Thomas W. Hooper, late the paying teller of that bank, wrote across its face the words, 'Good. T. W. Hooper, Teller.' A quarter before two o'clock on the same day I obtained upon this check from Richard Ward, late the paying teller of the Atlantic Bank, \$25,000 in bank notes; \$16,000 in

Atlantic Bank v. Merchants' Bank.

Atlantic Bank bills of \$500 each, and the residue in bills of other Boston banks. At precisely two o'clock on the same day I delivered them to Hooper at the counter of the Merchants' Bank. I waited till he counted the bills and pronounced them correct; I then saw him take the Atlantic Bank bills, and put them into a strap, which he marked with his pen and ink; the remainder of the bills he put into another strap, which he also marked; both of these packages he then put into the drawer in which he kept the money which he usually paid out. I had applied to Ward for the money at Hooper's suggestion.

"On the previous Thursday I drew a similar check, and at Hooper's suggestion applied to Ward for the money for it, stating to him that they were going to count Hooper's cash that day, and that Hooper wanted to know if he would let him have that till next day; that he might send in the check on the next day and he would pay it, and the Atlantic Bank should not lose any credit (specie credit) thereby. Ward then gave me a specie credit for \$15,000, and \$10,000 in bills, which I carried to the Merchants' Bank, and gave to Hooper; the bills I saw him put in the drawer; what disposition he made of the specie credit I don't know. The next day (Friday), being in the Merchants' Bank in the morning, Hooper said to me, 'I did not have occasion to use that money yesterday, and you had better take this down to Mr. Ward,' handing me, at the same time, a Merchants' Bank specie credit for the same sum I had given him the day previous, and the balance in bills, making up \$25,000. This amount I carried to the Atlantic Bank and gave to Ward. He gave me back my check, certified by Hooper, which I carried to the Merchants' Bank, and handed to Hooper, as a voucher that I had paid it.

"On the following Monday Hooper sent for me to come to the bank, and said, 'I shall want that money to-day.' I took a blank and filled out this check, and handed it to Hooper, who returned it to me, with the words, 'Good. T. W. Hooper, Teller,' written upon its face. I then went to the Atlantic Bank, and handed the check to Ward, and said, 'They are going to count the cash to-day at the Merchants'. Mr Hooper

Atlantic Bank v. Merchants' Bank.

wants that.' Ward handed me the bills, which I carried to the Merchants' Bank and gave to Hooper. He gave me no receipt or other evidence of my having left the money. I did not speak to any one at the Atlantic Bank, except Ward, in regard to the check. I had no bank account then at either bank. The bank bills delivered by me to the Merchants' Bank were not in payment or on account of any liability of my own.

"I had no conversation with any officer of the Merchants' Bank till the following day, when I learned of Hooper's death, and immediately went to the Merchants' Bank, and told Mr. Haven and others who came in, I think directors of the bank, all the circumstances attending getting the money on the check, and giving it to Hooper. Upon my telling Mr. Haven there were two checks drawn by me for \$25,000 each, he said, very emphatically, 'The bank will not pay them; when they are presented, I shall give instructions to have them sent back at once; Mr. Hooper had no authority for certifying checks.' He questioned me closely as to why I gave the checks; what representations Hooper could have given me which should have led me to draw the checks. He said that he was sorry I did so, as it placed me in a bad fix."

Ward testified: "I was teller of the Atlantic Bank in March 1855, up to the 29th. I received this check from Peabody on the 26th of March 1855. I paid the money for it, \$25,000, in bank notes, of which \$16,000 were in bills of the Atlantic Bank, and the remainder, \$9000, in bills of other Boston banks. The \$25,000 were owned by the Atlantic Bank. I took the bank bills from the drawer in which I kept the money, and put the check into the drawer. I had no authority from the president or directors to pay this check.

"I let money go on a check like this on the Thursday previous, to Peabody. I then gave him \$10,000 in Atlantic Bank bills of \$500 each, and \$15,000 in a specie credit. A specie credit is a slip of paper on which is written the name of the bank, the date and amount of the credit. The slip is headed with the name of the bank, and not signed. The next morning, Friday, Peabody came in and brought me \$10,000 in bills,

Atlantic Bank v. Merchants' Bank.

and a specie credit of the Merchants' Bank for \$15,000, a different credit. I cannot recollect whether or not the bills were the same. The transaction of March 23d was not known to the president and directors of the Atlantic Bank.

"It was my practice to make a list of bills and checks against every bank, and send it as soon as I could after the bank opened. The Merchants' and Suffolk Banks did not settle in the morning. They would say: 'The Atlantic owes;' and the messenger would leave the list, and at twelve o'clock we would settle, and we would send in what we received between nine and twelve. If they sent back anything, it was by the messenger of the Atlantic Bank. It is the duty of the paying teller to make up the account. I sent a list, on the morning of 27th March, to the Merchants' Bank, of all I had, except the check dated the 26th for \$25,000. I sent checks, bills, &c.

"I put the check for \$25,000, which I received from him on the 26th of March, in the drawer with the ordinary funds of the bank. I make up my accounts daily. I called each of these checks for \$25,000 money.

"On the 27th of March the slip or list from the Merchants' Bank came to the bank before ten o'clock in the morning. It was not in Hooper's handwriting. The check of the 26th of March for \$25,000 was sent in before noon to the Merchants' Bank, with my second list and \$2,729.65 Atlantic Bank bills, which, with this check, made the accounts even. This check came back, and I then spoke to the cashier about it, and by his direction I gave them a specie credit of \$25,000. After I had given the credit, I took the check to the cashier, and gave it to him. This was before twelve o'clock. The first that the president or directors of the Atlantic Bank knew of this check was in that forenoon.

"I heard of Hooper's death about ten o'clock in the morning of the 27th of March. It was after my messenger had returned, and not from him, that I heard of it."

Benjamin Dodd, cashier of the Atlantic Bank, testified: "The first I saw of the check of March 26th was about eleven o'clock in the morning of the 27th. I had no knowledge of the

Atlantic Bank v. Merchants' Bank.

check of the 22d of March, and the transactions connected with it, until some time in April. Ward had no authority to make any loan to Peabody.

"Ward, on the 27th of March, handed me the check dated March 26th 1855, and said he had sent it up and it came back. I handed it to the messenger with directions to go up and demand payment. The messenger returned the check unpaid, and it was put in the hands of a notary and protested before two o'clock for non-payment.

Franklin Haven testified: "I am the president of the Merchants' Bank, and was in March 1855. Thomas W. Hooper was paying teller of the bank during the month of March 1855. The words, 'Good. T. W. Hooper, teller,' written across the check, are in his handwriting. Hooper had no authority in behalf of the Merchants' Bank to make it."

"We count our cash once a quarter, in accordance with an established practice. It was usual to give notice at two o'clock, or about that time, to the teller that cash was to be counted, so that he might be there. On the 26th of March 1855, the directors agreed to return after bank hours in the afternoon and count the cash. I stated to Hooper as I passed out of the bank, at a quarter before two o'clock, that the cash would be counted that afternoon. Hooper was the first teller; he is accountable for all the cash. His cash should correspond with the first bookkeeper's balance. I returned about three o'clock. Hooper was in the business room. We counted in the directors' room. I took all the checks out of the drawers of the receiving and paying tellers after they had listed them. I made a list of them. This took me an hour. At four o'clock Luke Fay, a director, came in. No director had been in meanwhile. The money was brought from the general banking room into the directors' room by Stimpson, the receiving teller. The bills were assorted in packages of the respective banks. I noticed and was annoyed at the large amount of Grocers' Bank bills — \$73,000. I then observed two packages of Atlantic Bank bills: one of \$16,000 in bills of \$500 or \$1000 each; and the other of \$31,000. The amounts did not attract my attention. My curi-

Atlantic Bank v. Merchants' Bank.

osity was excited by finding two packages. I put the question to the cashier, 'Why there should be two packages?' He said he did not know. On hearing this, Fay asked, 'Why should it be known outside of the bank that the cash was to be counted?' I said, 'Perhaps one of the directors mentioned it.' He said, 'No; it did not come from them.' Just then Hooper came into the room, and I put the same question to him about the Grocers' and Atlantic bank bills. This was before I had given Hooper back his cash. To my question Hooper replied, 'I took part of the Grocers' bills for New York funds. A part of the Atlantic bills were in exchange for our bills.' I think he said 'taken of Peabody.' Bearing in mind what Fay had said, I said to Hooper, 'Have you said anything about counting the money?' He replied, 'No; you did not tell me till just two o'clock; I had no opportunity of telling any one.' We were then in process of counting the money. The checks, bills and specie were found to agree with the balance of cash, as stated in the ledger. I then put the question to the cashier, 'If he had ever seen anything in Hooper that would lead him to suppose he would favor banks or brokers?' He replied, 'No; I believe him to be a strictly honest man.'

"The cash having been counted and found correct, Hooper was called in, and I told him we were satisfied, and to take his money. He gathered up his money, put it into the trunks, and locked it up and took it away. I remained with Fay in the directors' room, made a record of counting cash, and Fay and I certified it in the directors' record, as usual. The balance of cash is verified by these quarterly accounts. A certificate is made by directors of the result of the examination, and the cash is then delivered back to the teller. This is the usual course, and was done at this time. I had no suspicion of his integrity. I had no suspicion whatever that these bills were not all the property of the Merchants' Bank. I had not the slightest suspicion that they were obtained by fraud, or improper dealing with any person whatsoever. The delivery over to Hooper was precisely as usual. I don't know how soon he left the banking room. I should think it was nearly six o'clock when

Atlantic Bank v. Merchants' Bank.

I made the record. After we had finished with Hooper and delivered him back his cash, I put the question to Fay, 'Who told you that the money was to be counted?' He replied, 'A friend of mine said he knew that I was coming to a counting of the cash this afternoon, and that friend did not care to have his name mentioned.' I said, 'Not care to have his name mentioned? What did he say?' Fay replied that he said he knew I was coming to count the cash that afternoon, and that he should know it when we counted it again. This was the first Fay said on the subject, except to ask the question why it should be known that the cash was to be counted. I then said to Fay, 'After such a communication, it is due to the bank and Mr. Hooper that his cash should be counted suddenly.' Fay said, 'Hooper is certainly an honest man.' I said, 'I do not doubt it; but such a statement being made, it devolves on us to have another count. You and I and the cashier will count his cash some day this week.' I separated from Fay and went home, not having any suspicion against the integrity of the teller. I most certainly should not have handed the cash back to the teller if there had been a deficit. After the cash was handed back to him, he was left with its entire control, in the usual way, and no one to watch him.

"The next morning I came down to the bank a little earlier than usual. Hooper was just entering the bank when I arrived. I said to Hooper, 'I want to speak to you.' He followed me into the directors' room. I said, 'Mr. Hooper, I asked you yesterday if you had told any one that the money was to be counted?' He said, 'No; I told you I had not.' I said, 'Such a communication as that disturbed me a little, and I felt that I would speak to you, and ascertain if you had named it to any one.' I asked why it should have been alluded to outside of the bank. I told him I put great confidence in him, and should be satisfied with his answer, and wished, if there was any trouble in his private affairs, he would divulge it to me. He said emphatically, 'The cash is right. You have examined it, and know that it is right, and I have nothing to divulge.' He reiterated what he said about the Grocers' and Atlantic bills.

and said : ' I told you how those bills were got ; ' and I told him I was satisfied. Hooper then said, ' I should like to be absent a few days to go to New York. ' I said, ' Why be absent, Mr. Hooper ? I told you I would be satisfied with your statement. I don't wish you to go. ' He replied, that it had been his intention to go to New York the day before Fast, and be absent to the end of the week ; and he should feel better to go now and come back at the end of the week, when I should be satisfied that the cash was right. I said, ' I don't wish you to go, but do as you please. If you see fit to go, go, and deliver your money to Mr. Stimpson. ' He then said, ' You and the directors have put great confidence in me, and I am much obliged to you for it. ' I did not displace him. I then turned to a person who had been waiting for me. I did not leave the directors' room for half an hour after Hooper had left it. I then went into the banking room, and saw the cashier in Hooper's place. I had not entertained the slightest suspicion of Hooper's integrity ; and his emphatic contradiction had given me the utmost confidence in him. I supposed that he was not to leave the bank till the close of business hours that day, and then come back on Friday or Saturday and resume his duties.

" The check for \$25,000 was presented to the Merchants' Bank for payment when I was present. Payment was refused. It was replied, ' No funds to pay it ; the check is not good ; it is a fraud. ' I cannot say what the words used in reply were. I think I said Hooper had no authority to certify. He had no authority. We paid no money on account of this check. A demand for the money was made on the 9th or 10th of April 1855.

" I knew afterward that Hooper did not go to the counter on the morning of the 27th, but he had full authority and was directed to go and take his place as usual. Stimpson took his place by my direction ; the fact was communicated to me that Hooper had not taken his place, at half past nine o'clock. I heard of Hooper's death before half past ten o'clock. After I heard of this, Peabody was in the bank that morning. He communicated to me the origin and the transaction of the

Atlantic Bank v. Merchants' Bank.

check of \$25,000, dated March 26th. I immediately made known his statement to the directors. I referred him to the directors as they came in, to make his statement to them."

Luke Fay testified: "I attended the counting of the cash on the 26th of March. We found the cash all right. I did not find anything or see anything in the cash which led me to distrust the integrity of Hooper. I saw the money handed back. If I had had the slightest suspicion of his integrity, or had found any deficit, I would not have assented to the delivery of the cash back to the teller."

The plaintiffs offered to surrender the check of March 25th 1855, and put it on file for the protection of the defendants.

Upon the evidence introduced by the plaintiffs, (the material parts of which are above stated,) the defendants offering none, the case was taken from the jury and reserved for the determination of the full court; with an agreement that the court, drawing such inferences of fact as a jury would be warranted in drawing, should enter such judgment as the law required, or order a new trial, if in their opinion one ought to be granted

The arguments were made at November term 1857.

C. B. Goodrich & W. R. P. Washburn, for the plaintiffs.

R. Choate & A. H. Fiske, for the defendants.

SHAW, C. J. The amount in controversy in the present case is sufficient to give it a character of importance, and the principles on which it is to be decided require careful consideration. It is an action brought by one regularly incorporated city bank against another, to recover the sum of \$25,000, which it is alleged by the plaintiffs has been fraudulently transferred from their own possession to that of the defendants, and the latter have no right in equity and good conscience to hold it against the plaintiffs. The action was commenced on the 3d of May 1855, being *indebitatus assumpsit* for the above named sum and interest thereon. The answer denies that the defendants owe the amount as alleged.

There is no great conflict of evidence now on any material point, and the case upon the evidence is substantially this:

Thomas W. Hooper, who was the paying teller of the Mer-

chants' Bank, was a defaulter to a large amount. He was the principal teller, and had the immediate charge and custody of the cash funds within the bank; and other officers, who were necessarily entrusted with cash, accounted with him daily. In theory therefore he had, and at all times ought to have in his control, cash — that is always, be it understood, specie or bank notes — to the amount which he would appear to be charged with by the balance of the bookkeeper's account. That balance perhaps could not be struck till the close of each day's business, because during business hours each day the balance might be constantly shifting by the passing transactions.

It was the practice of the directors to examine and count the teller's cash occasionally, ordinarily as often as once a quarter. The purpose of this examination and count was to ascertain whether any cash had been withdrawn. The teller having no occasion and no authority to pay or receive money outside of the bank, if there was a deficiency it must be attributed to fraud or mistake, and it would afford one means of detecting either. On Monday, the 26th of March, shortly before the close of bank hours, the president gave notice to Hooper, the teller, that he and a committee of the directors would attend that afternoon to examine and count his cash. The object of giving this notice was that he might be there with his keys, ready to produce the cash as called for. Short as the time was, it gave Hooper an opportunity to carry into effect a fraudulent scheme, by which he was to obtain a sum of money to place with his own, whilst being counted, and thus fraudulently to conceal from the directors a knowledge of his defalcation.

A conspiracy had been deliberately entered into, between Hooper, the defaulting teller of the Merchants' Bank, Ward, a teller of the Atlantic Bank, and Peabody, a broker, to this effect; that Peabody should draw a check on the Merchants' Bank, where he had no funds, for \$25,000; that Hooper should certify it to be "good;" that thereupon Peabody should take it to Ward at the Atlantic Bank, receive \$25,000 of the bills of the Atlantic Bank, or other cash funds, take them back and deliver them to Hooper, to be placed with his own cash funds, and be

Atlantic Bank v. Merchants' Bank.

counted with them, as his own ; after they had been so used, Hooper was to deliver back the like amount of \$25,000 to Peabody, to be delivered to Ward, and replaced with the funds of the Atlantic Bank. In confirmation of this conspiracy, and that it was deliberate, it appears that the same thing had been actually practised on Thursday of the previous week, when Hooper had notice that his cash was to be counted ; but that notice for some reason was not acted on, and the cash was not counted ; the \$25,000 taken from the Atlantic Bank in the manner before stated was restored to them by Ward, their teller. The same thing was again done on the 26th of March, near the close of bank hours, after the notice to Hooper, that his cash was then to be examined. Peabody drew the check, Hooper certified it "good," Peabody carried it to Ward at the Atlantic Bank, and received from him \$16,000 in bills of the Atlantic Bank and \$9000 in bills of other banks, carried them to Hooper, passed them to him over the counter of the Merchants' Bank, and they were placed by Hooper with the funds of that bank, of which he was the ordinary keeper within the bank. Peabody and Ward both knew of the purpose for which Hooper wanted the money ; and it was the understanding between all of them, that the money was the next morning to be returned to Ward, and replaced with the funds of the Atlantic Bank, as had been done the week before, when taken for a similar purpose. The delivery of the money from Ward to Peabody was without the authority or knowledge of any other officer of the Atlantic Bank.

Pursuant to the notice given by the president of the Merchants' Bank to Hooper, the cash of that bank was counted on the afternoon of the 26th of March, by Haven, the president, and Fay, one of the directors. The above \$25,000 was included and counted with the teller's cash, the amount was found to be correct, and a certificate to that effect was made and entered in the minutes of the directors. After it was thus counted, the whole amount was returned to Hooper, who put it into his trunks, locked them, and returned them to their usual places in the bank.

During this examination the suspicions of the president were somewhat excited by finding, as he thought, an unusual amount of the bills of the Grocers' Bank, and by finding two large packages of Atlantic Bank bills, and he questioned Hooper about it, but he had no suspicion at that time of Hooper's dishonesty.

During the same afternoon, Fay stated to the president, that it was known outside the bank that the cash was to be counted that afternoon; and Hooper was asked if he had said anything about counting the money; and he said he had not.

After Hooper had received back his cash and left, some conversation took place between Fay and the president, in which they expressed their confidence in the honesty of Hooper, but their surprise at the singular circumstance that it should be known out of the bank that the cash was to be then counted; and a proposal was then made and assented to have to another examination as soon as convenient, suddenly, that is without previous notice to the teller.

In consequence of these feelings the president determined to speak with Hooper the next morning. He went to the bank earlier than usual, a little before the ordinary bank hour for opening. Hooper was then just entering the bank; the president wished to speak with him; and they went into the directors' room, when a conversation followed which is thus related in the president's testimony: "I said, 'Mr. Hooper, I asked you yesterday if you had told any one that the money was to be then counted.' He said, 'No, I told you I had not.' I said, 'Such a communication as that disturbed me a little, and I felt that I would speak to you, and ascertain if you had named it to any one.' I asked why it should have been alluded to outside of the bank. I told him I put great confidence in him, and should be satisfied with his answer, and wished, if there was any trouble in his private affairs, he would divulge it to me. He said, emphatically, 'The cash is right. You have examined it, and know that it is right, and I have nothing to divulge.'" Some other conversation took place. Hooper thanked the president for the confidence the directors placed in him, and expressed a wish to go immediately to New York, where he had been in-

Atlantic Bank v. Merchants' Bank.

tending soon to make a visit. Haven discouraged his going there, but told him, if he saw fit to go, to go, and deliver his money to Stimpson, the receiving teller; not expecting however that he was to leave before the close of business that day. Haven did not displace him, and entertained no suspicion of his integrity. Haven did not go into the banking-room till half an hour after, and then saw the cashier in Hooper's place. After the counting, the president and committee would not have handed back the cash to Hooper if there had been a deficit; it was handed back to him and left in his entire control, in the usual way, without any one to watch him.

It appears that Hooper did not take his place in the bank room the next morning, and before half past ten committed suicide.

It further appears that on the 27th, after the death of Hooper by suicide had become known, Peabody, and afterwards Ward, went into the Merchants' Bank, and fully disclosed to Haven and other directors the facts and circumstances under which the check for \$25,000 had been drawn by Peabody, and certified "good" by Hooper. Haven said to him, that Hooper had no right to certify such check, and the bank would not pay it.

In the morning of that day, according to the usual practice of Boston banks, Ward, the teller of the Atlantic Bank, received from the Merchants' Bank, by the messenger, the \$16,000 of their own bills, and the \$9000 of bills of other banks; and Ward, in his official capacity, gave the Merchants' Bank credit for that amount, together with some few other bills. This was before the death of Hooper was known. The check was not then sent. But subsequently the check was sent with other funds, after the death of Hooper was known, but before twelve o'clock. The other funds were received by the Merchants' Bank and credited, but the check was refused payment, and subsequently on the same day protested by a notary public for nonpayment.

Perhaps it may not be necessary to state the facts more particularly; some others may be referred to hereafter.

In the first place, it is obvious that this sum of \$25,000 in cash — bank notes, used and treated for most purposes as cash,

in the same manner with specie — was transferred from the plaintiff bank to the defendant bank by means of a gross fraud and conspiracy, deliberately formed, carried into effect by three persons, with steady purpose and perseverance, attended with as much criminality and turpitude as can well characterize any transaction where rights of property only are violated. Hooper, the paying teller, intrusted with the actual custody of the whole cash of the Merchants' Bank, was under an old defalcation which he designed fraudulently to conceal; Peabody, a broker, and Ward, a confidential officer of the Atlantic Bank, entered into a fraudulent conspiracy with Hooper, with a full knowledge of his criminal purpose, to enable him to conceal this defalcation from his employers, first by abstracting the funds of the Atlantic Bank by an embezzlement amounting to larceny, and subsequently to defraud the Merchants' Bank by a similar embezzlement to be practised by Hooper. It is immaterial to any question here, who of these parties was the first to propose the scheme, or what motive personally actuated them respectively; they each knew of the criminal purpose, and each contributed in his own measure to accomplish it. It was a criminal conspiracy to do an unlawful act by unlawful means. The first act was that of Hooper, in indorsing Peabody's check.

The next consideration is, that by means of this fraud the money was taken from the Atlantic Bank, without their authority, and for which they received no consideration, and went directly into the cash funds of the Merchants' Bank, for which they paid no consideration; unless it was to be deemed a lawful payment of Hooper's defalcation, which we shall consider afterwards.

It was the property of the plaintiffs when it left their bank; the guilty agents, including Hooper, with full knowledge of the fraud, could acquire no title to it against the plaintiffs; Hooper could therefore give no title to the bank, as of right; nor could the bank hold the bills as negotiable securities, transferable by delivery, taken for a good consideration and in the ordinary course of business, nor as money, without some consideration paid. It appears therefore to be the ordinary case where one

party has received money, the property of another, which right-fully, equitably and in good conscience he cannot hold, and therefore the action of assumpsit for money had and received will lie for it.

It may be proper to consider whether money had and received is the proper remedy, or whether the action should have been in tort for the conversion of the bank bills. It appears that \$16,000 of the \$25,000 taken from the Atlantic Bank was their own bills. Had these been new bills, never issued by the bank, a scruple might arise, whether the bank without having delivered them would be bound as contractors. It is said that on this ground the Bank of England never issue a bill the second time, but take it up and cancel it. But here it is the universal custom of all banks to issue the same bills *toties quoties*; so that when a bank bill duly executed is abroad, in the hands of a *bona fide* holder, the law will presume that it has been issued by the bank, and hold them to pay it. Stealing or embezzling from a bank their own notes, duly executed, and kept as cash to be paid out whenever the bank has occasion to make payment, has the same injurious consequences of defrauding the bank, as the taking of the bills of other banks held by this bank; and the impossibility of identifying such notes, when out, as notes thus stolen, leads practically to the same result. Where the question is of an intent to defraud the bank themselves, and also to defraud other persons, stealing from a bank their own notes is to be considered an offence of the same character as that of stealing the notes of other banks. We do not perceive therefore that any distinction can be made between the \$16,000 and the \$9000. And the court are of opinion that as the bills in question were used and treated as money, and are now claimed to be held by the defendants as their own cash, the case comes within the general rule, that when bank bills are delivered as money and received as money, they may be considered as money for the purposes of remedy, and that averments of money had and received, money paid, money laid out and expended, may be sustained by proving such payment in bank bills, in the same manner as if paid in specie. Where money in bills was en

trusted to a carrier who lost it at play, it was held that the owner might recover the amount of the winner, in an action for money had and received. *Mason v. Waite*, 17 Mass. 560. *Cummings v. Noyes*, 10 Mass. 433. *Whitwell v. Vincent*, 4 Pick. 449.

It is a well settled maxim, that where chattels have been taken without title, and converted, so that the owner might maintain trover, if money has been received for them, he may waive the tort and maintain assumpsit for the money. It seems to follow that when the thing taken without title and converted is itself an article which is ordinarily regarded as money, this action will lie.

It is therefore, we think, to be considered in the same light as if by the same means they had obtained the money from the Atlantic Bank, and transferred it to the Merchants' Bank, in bags of current specie.

But further, it seems to us that these views are rendered entirely unnecessary by the fact, that before either bank had notice of the fraud, by which these bills passed from the possession of the one to the other, the Merchants' Bank, by their authorized officers, presented all the bills, as well the \$16,000 of Atlantic Bank bills, as the \$9000 of the others, to the Atlantic Bank, and received payment for them. It follows therefore that whether the defendant bank received these bills rightfully or wrongfully, with or without valid title, they presented them to the plaintiff bank, and received of them the full amount in cash; so that if the defendants are responsible in any form, it is strictly for money had and received.

We have said that this money came into the possession and under the control of the Merchants' Bank without any consideration passing from them, unless, as it is argued on the part of the defendants, it was received in payment of a debt due them from Hooper. The argument is this: that Hooper, being under a defalcation to a large amount, which he had kept concealed, obtained the money from the Atlantic Bank, and placed it in the Merchants' Bank, by way of payment of such balance, and that it is immaterial to the bank how he acquired the money to

pay them with, even if by fraud, if the bank did not know or participate in it. But if the law were so, this argument, in our opinion, cannot be sustained by the facts.

Whether the transfer of a sum of money, from one party to another, operates as a payment of an existing debt or duty, depends upon intention, and the intention of both parties. Such intention may often be implied from their relations and other circumstances. But it must exist. The bank could have no such intention, because, if there was any defalcation, it was not known to them, and any intent to receive this money in payment of such defalcation is negatived.

There was no payment in fact, no delivery of money, actual or constructive, from the hand or power of the one to that of the other. Hooper, by clandestinely placing it with other funds of the bank in his own possession, for the purpose of deceiving the bank, did not part with the control over it; it was still in his own power. Passing it to the committee, for the special purpose of being counted as the bank's, not as his, inducing them by fraud to believe that it was the bank's, and thereby precluding them from any inference or suspicion that it was his, was no act of transfer from Hooper, and could be accompanied by no intent to receive it as payment. Hooper's presenting that sum of money to the committee for that purpose was a significant declaration on his part, that it was all money which, as their officer and agent, he had received as their due, in the regular course of their business; and although this was a gross falsehood, it shows the state of mind in which their officers received and examined his money and returned it, and precludes the idea that they received it in payment.

But in truth it was not the intention of Hooper to transfer the money to the bank, for their own use, in satisfaction and discharge of the sum due them in consequence of his prior defalcations. It was intended to deceive them by exhibiting these bills of which he himself was the keeper, and it was with the expectation and intent, as soon as that object was accomplished, to deliver them back. Such a transaction could no more cancel and pay a debt than the exhibition of the same amount in counterfeit bills.

If it was a payment, it discharged Hooper and his sureties from all liability for such defalcation, which, as it seems to us, cannot be pretended.

Had this money been found in the custody of Hooper, on examining his cash after his death, and nothing had been shown as to the mode in which it had been acquired, it might have been presumed to have been received by Hooper, in his official capacity, for a valuable consideration, in the due and ordinary course of business, in which case it might well have been presumed to be the property of the bank. Such possession under such circumstances might have been a *prima facie* title. But here there is no room for these presumptions. The proof is, that it did not come into the possession of Hooper in his official capacity, in the ordinary course of business; but was procured and placed there by his fraud.

If the act of the president and Fay, in examination of the money, is relied on, as an admission on the part of the bank that Hooper had accounted for all the cash entrusted to him, and that the certificate entered on the books was a discharge to him; the answer is, that certificate was obtained by fraud and cannot affect the bank; and further, that examination was made *alio intuitu*; it was not an accounting, it was simply an examination, and the whole, when examined and certified, was redelivered to Hooper, and remained in his custody till the next day. In consequence of his suspicious conduct that morning, and his almost immediate death by suicide, other officers of the bank were put into possession of the bills thus left by him.

The argument is, that by the production of the money to the committee, as and for his balance, and by the certificate of the committee, the property and right to the money vested in the bank. But the answer is, that it was not produced as and for his balance; neither party had any such relation in view.

If the defalcation of Hooper, which was then not known to the bank, but which is now known to have then existed, was not discharged by the production and exhibition to the committee of these bills, then no consideration passed from the defendants to Hooper, or any one else, as the price of these bills, and

the defendants acquired their possession of them without consideration.

There is however another aspect in which the case may be considered, not essentially varying from the foregoing, but which may bring into view another legal element, that of knowledge of the fraud.

Undoubtedly the law intends, for wise considerations, to give the highest degree of credit to negotiable securities, payable on time not yet expired, taken for valuable consideration, in the usual course of business, without notice of any antecedent fraud or want of title which would vitiate them, the reasons for which are very strong and quite satisfactory. *Wheeler v. Guild*, 20 Pick. 545.

The credit given to bank bills in ordinary circulation is still higher, and the actual possession will be accompanied by a presumption of good title. The presumption perhaps is not so strong when bank notes are collected in large sums, and in the dealings of banks with them. Still, the presumption in either case is one of fact, and may be rebutted by evidence. And it will be rebutted in a case where the owner of bank bills proves that certain bills owned by him have been obtained from him by theft or fraud, and have passed from the fraudulent possessor to the defendant with knowledge of the fraud, and, if they have passed through the hands of several persons, that each had knowledge of such fraud. The holder, with the full benefit of the presumption of fact that he has a good title, cannot hold it against one who can prove a prior good title, not rightfully transferred to any one, though without such notice he would have held it. For the application of this principle, actual notice is not necessary; constructive notice is sufficient. In the present case, there is not the slightest ground to suspect that the president or any officer or director of the Merchants' Bank had any actual notice of the fraud by which Hooper obtained these bills from the Atlantic Bank, or that he obtained them at all. They had no knowledge of his defalcation till after his death, when they obtained a knowledge of the facts from Peabody and Ward.

Had they constructive notice? A bank is a corporation which can only act by agents; all the transactions of the bank, in buying or selling, borrowing and lending, every act by which they can convey property or acquire it, must be done by agents. When any one of these transactions is of such a character, that false representations, practice of fraud, or knowledge of fraud practised by another, would avoid the transaction, if done by an individual, it will equally affect a corporation, if done or had by the agent in the same transaction for a corporation. Suppose a corporation have occasion to obtain insurance, and the agent who negotiates it makes false representations, which would render the policy void, if made for himself; it will render it void as a contract with the corporation his principals; they will be affected with constructive notice. So, if a bank should have occasion to buy a horse for their messenger, and authorize him to buy one, and the agent should find one to his liking, and in negotiating about the purchase, should be informed that another man claimed that the horse had been obtained from him by fraudulent representations; it would be constructive notice of such claim to the bank.

In the present case, treating these notes obtained from the plaintiffs in the most favorable view, either as bank bills, or negotiable securities not discredited, or as specific property, the court are of opinion that the only title acquired in them being through the agency of Hooper, his knowledge of the fraudulent title under which he acquired and held them was constructively the defendants' knowledge, and they cannot hold them against the true owners.

Here the first step was an official act of Hooper, the paying officer of the bank, certifying that Peabody's check was good. It has been held, that a bank teller has no power to bind the bank by such a certificate, even if the fact is true when the check is presented; so that if not then paid, and other checks come in and the fund is paid out on them, the holder of such check has no remedy against the bank. *Mussey v. Eagle Bank*, 9 Met. 306.

But in the present case, it was a formal assertion under his

Atlantic Bank v. Merchants' Bank.

official signature to a stupendous falsehood. This was done to enable his guilty associates to make use of what appeared to them perhaps to be the credit of the bank. Possibly Ward believed that this was a good security, by means of which he could realize the money from the Merchants' Bank, and replace that of which he was defrauding his employers. At all events, we cannot say that without the intervention of this official act the fraudulent teller could have obtained the money he did. It was solely through the agency of Hooper, that the defendants acquired any title to the bills, or any possession of them. The whole transaction; his falsehood to the officers in saying that he told nobody that the money was to be counted that day, after he had notice from the president; when the evidence shows that this guilty machinery was all put in motion by notice to his guilty associates; all these circumstances show how deeply conscious Hooper was of a guilty purpose. If notice to the agent was constructive notice to the bank, then the bank took these securities under an invalid title, which cannot prevail.

Some cases were cited to show that where an agent has become indebted to his principal, and pays the balance in current money, the principal can hold the money, although obtained by fraud. This may well be conceded to be good law, when the money obtained by fraud is not obtained by the exercise of such agency, the agent makes no contract in behalf of his principals, and they take nothing and claim nothing through his fraud.

It was contended by the defendants, that the plaintiffs had waived their right to proceed against the defendants, and had affirmed the doings of Ward, in taking and claiming payment of the check. But we see nothing in the evidence to warrant this conclusion. No notice was had of the fraud until after the \$25,000 in bills had been sent from the Merchants' Bank to the Atlantic Bank, and paid by the latter. That is, they were received and credited to the Merchants' Bank, but, according to custom, no settlement was made. Before twelve o'clock, but after Hooper's death, Ward made out another list, including the \$25,000 check, with a few thousand dollars in bills, to pay the

Atlantic Bank v. Merchants' Bank.

balance due the Merchants' Bank. It came back by the messenger, rejecting the check; by which their balance of \$25,000 still remained due, which the check, if good, would have cancelled. Then the cashier told Ward to give them specie credit instead of the check. The specie credit was not given in satisfaction of the check, but of a general balance due from the Atlantic Bank to the Merchants' Bank. This was no confirmation of the act of Ward in taking this check.

So of the presentation of the check for payment. It was handed to the Atlantic Bank by Ward as a valid security for what it purported to be, a check by Peabody on the Merchants' Bank. The only proper course for the plaintiffs was to present it, and leave it for the defendants to determine whether they would pay it or not; and the protest was of no other effect than to get evidence of the presentment of the check for payment, and the refusal of the defendant bank to pay it.

If the plaintiffs had acquired a right of action, there was no waiver in not bringing it immediately. Nothing done or foreborne by them was the cause of any loss or inconvenience to the defendants, and no act is shown waiving any right.

A case was cited after the argument, which in its facts bears such a resemblance to the present, that it seems to deserve a separate consideration, though upon a careful examination it appears to us to have been decided upon a principle not inconsistent with those adopted in this case. *Ingraham v. Maine Bank*, 13 Mass. 208.

In order to compare the two cases, it is necessary to consider who were the parties, and what was the question in the case cited. It was a question, whether the sureties for the cashier's good behavior, on a bond given on the 1st of June, were liable for the delinquency complained of. The cashier was delinquent before the 1st of June, and so continued to October, when an examination of his cash was made by the directors. To meet this, the cashier officially drew checks on other banks, received the money and placed it with his own, but did not credit those other banks with the amount; his cash therefore appeared right. After the examination, he paid those other banks out of the

funds of his own bank, so that the transaction did not appear on the books of his own bank, and his deficit in fact stood as it did before the 1st of June, when the bond was given. The question was, whether at the time of the removal of the cashier, soon after this last transaction, the deficit then existing was chargeable to the obligors of the bond given on the 1st of June. There the money was borrowed of other banks by the cashier, in his official capacity, and under his general authority, to bind his bank by drafts, and they were responsible to those other banks, although, in the particular case, without any special authority, or any exigency of the bank requiring it. This might have been an act of misconduct on his part, though it would not impair the right of the banks with whom he dealt; unless his unlawful purpose was known to them, which was not suggested. The money thus raised by their cashier on their credit, and mingled with their cash, was their property in all respects; nobody could claim it by any prior title. The cashier's delinquency on that occasion consisted not in drawing the money, but in failing to credit it to the bank from which it was drawn, in order to deceive and mislead his employers. Not having treated the banks of which he borrowed the money as creditors of his bank, he regarded the drafts practically as a personal loan to himself. When therefore he afterwards took the funds of his bank to pay those drafts, it was done to carry out his fraud, to cancel his own debt; it was an unlawful embezzlement, of the character of larceny, practised then, and a violation of his duty, amounting to a breach of the bond given on the 1st of June, so that the sureties on that bond were liable.

The opinion of the court is very short, and does not fully express the grounds on which the judgment was rendered. The court say, that though a deficit existed before the execution of this bond, and might have been covered by an antecedent bond, yet the taking of money afterwards, to pay what he had thus (clandestinely) borrowed, was also a breach of the condition of this bond. "For the money, when placed in the vaults became the property of the defendants" (the bank); "and the transaction cannot be distinguished from an actual payment from his

own funds to supply the defalcation, and a removal afterwards of the funds of the bank without the consent of the defendants."

It is upon this last paragraph of the judgment, that we think it necessary to remark. In that case, undoubtedly the money was the property of the bank, raised on their credit, and placed with their funds. Besides that, as against the cashier, and those responsible for him, it was so far the property of the bank, that he would be estopped to deny it, and as against them it would be the property of the bank. To take an illustration from the present case, suppose Hooper had had a secret hoard of his own outside the bank, and had procured from that \$25,000 and placed it with his own for the examination of the committee, and they for some cause had, after counting it, withheld it and not returned it to him, he could not have reclaimed it; as against him the property would be held theirs. But if, instead of such hoard of his own, he had fraudulently obtained it of another person, it would not be theirs, in a true and proper sense, that is, by a good and indefeasible title. But what is more decisive of the correctness of the judgment in that case is this: The court intimate that the facts taken together would perhaps prove a breach of both bonds, that anterior and that subsequent to the 1st of June; and probably they would. In that case, the breach by the prior misconduct would have caused no damage to the obligees, because by some means, right or wrong, the loss occasioned by it would have been repaired, and the judgment must have been for nominal damages only. Whereas the breach by the subsequent misconduct, in wrongfully withdrawing the funds of the bank, was the very breach by means of which the obligees sustained their loss; and it was no answer by the obligors on that bond, that the misconduct of the cashier originated prior to the bond given by them.

In the last clause the court say, "the transaction cannot be distinguished from an actual payment from his own funds." This shows how necessary and important it is, in construing judicial decisions, to consider them as made with a tacit reference to the subject matter, and the facts and circumstances of

each case, and with the limitations and qualifications implied thereby. The court say, the money, when placed in the vaults by the cashier, became the property of the bank. True, it did in that case, and would in all cases as against the cashier who had so placed it for such purpose; but they do not mean to say that his placing it there, however acquired, would make it absolutely the bank's, to all purposes; the limitation was not expressed, because not necessary in that case. So "the transaction cannot be distinguished from an actual payment in his own funds," was true as to that case, and with a view to the judgment to be there rendered. The deficit under the first bond had been satisfied by funds produced by the cashier, and which the bank was not answerable to any one else for, no actual damage had been sustained by the bank, and if it could have a judgment it would be for nominal damages, and would afford no defence or relief to the obligors on the subsequent bond. For any purposes of that inquiry the transaction was not distinguishable; but we are not therefore to infer that the bank can hold it against the true owner, merely because the cashier paid it in, if he procured it by such means that the true owner might recover it back. The decision therefore is not repugnant to the one which we now make, which is, that the plaintiffs are entitled to recover.

MERRICK, J. Being unable, after the most careful consideration, to concur in the opinion of the majority of the court, it seems to me proper, in a case of so much importance, both in reference to the magnitude of the claim made by the plaintiffs, and to the general principles involved in its decision, to state the reasons of my dissent.

The questions to be determined arise on a report of the presiding judge, which contains a statement of the whole evidence produced upon the trial. By the agreement of the parties, the court, drawing such inferences as a jury would be warranted in deducing from the facts proved, are to enter such judgment as the law requires.

It is in the first place to be noticed that there is no conflict of evidence, and that there is now no controversy or doubt in

relation to the facts or the transactions which actually occurred. They may be briefly stated. Hooper was the paying teller of the Merchants' Bank. In that capacity he was entrusted with and had in his possession all the cash of the bank, for which he was at all times immediately accountable on demand of the directors; and the amount for which he was so accountable was always shown by and corresponded with the balance of cash charged on the ledger kept by the first bookkeeper. Before the 26th of March 1855 Hooper had secretly and fraudulently abstracted from the cash so entrusted to his care, and had applied to his own use large sums of money for which he was then the debtor of the bank, and legally obligated to make immediate payment. At about a quarter before two o'clock in the afternoon of that day the president notified him that the directors would meet at three o'clock in the same afternoon to count the cash of the bank, and that he would then be required to produce it. Knowing of the deficiency of the cash on hand, which existed by reason of his defalcation, he thereupon forthwith proceeded to supply himself with means which would enable him to present and deliver to the directors the whole amount of cash for which he was then liable, and thus satisfactorily to account to them for all the funds with the care and custody of which he had been entrusted. To this end, and in pursuance of a conspiracy previously concerted between the parties for that purpose, Peabody, who had no funds there, drew his check upon the Merchants' Bank for \$25,000, and presented it, Hooper having first certified upon its face that it was good, to Ward, the teller of the Atlantic Bank. Ward, without any right or authority to do so, and knowing the unlawful and fraudulent purpose for which it was to be used, paid to him the amount of the check in money belonging to the plaintiffs, consisting partly, to wit, to the amount of \$16,000, of bills of the Atlantic Bank, and partly in bills of other banks. Peabody immediately carried and delivered the same to Hooper, who received and placed all the bills so brought to him in the drawer where he kept the cash of the bank, and there all the bills remained until the arrival of the president at the time appointed for the meeting of the

directors. All the cash of the bank was then brought from the general banking room and delivered to him in the directors' room. He then commenced the proposed examination; first taking all the checks out of the drawers of the receiving and paying tellers, and making a list of them. Just as he had finished doing this, Fay, another of the directors, came in, and they proceeded to count the bills which had been brought in and presented to the directors as the cash of the bank. The bills of the Merchants' Bank were counted by Fay and the cashier, and all the bills of other banks, including those which Hooper had fraudulently procured through Peabody and Ward from the Atlantic Bank, were counted by the president. The aggregate of all the checks and bills so counted was found to be correct; that is, was found to correspond with the balance of cash charged on the ledger. The directors having thus completed their examination, found that all was right, and that there was no deficiency in the amount of cash to be accounted for, they then, according to the usual course of proceeding upon such occasions, made their certificate that the cash on hand corresponded in amount with the balance charged on the ledger; and they thereupon delivered that certificate to Hooper, together with all the money they had received from him, to be kept by him in his official capacity, for and as the property of the bank as before. This completed the service they met to perform, and they then withdrew, not having the slightest suspicion of the integrity of Hooper, or that any of the bills counted were not the property of the bank, or that any part of them had been obtained by him by fraud or by improper dealing with any other person. But early in the forenoon of the next day, and before any change whatever had taken place in reference to the bills which had been fraudulently obtained from the Atlantic Bank as before stated, the defalcation of Hooper, and the fraud which had been committed by him, in conspiracy with Peabody and Ward, were suddenly discovered, and all the facts became known to the parties who had been defrauded. The plaintiffs thereupon immediately demanded the bills or payment for them of the defendants, to which demand the latter refused to accede, but re-

tained the bills, and applied them, under a claim of right thereto, to their own use.

When that demand was made, the bills which had belonged to the plaintiffs, and of which they had been fraudulently deprived by the tortious and criminal acts of the conspirators above stated, were in possession of the defendants. And therefore the real and only question is whether, in the circumstances under which they received the money, they thereby did upon the settled and established principles of law acquire a legal title to it, so that it at once became their property. There seems to be no peculiar equity in favor of either of the parties, which should be allowed to affect or vary the application of those principles. The teller of each of the banks had been guilty of gross and inexcusable fraud; and the loss, by whichever of them it is to be sustained, is the direct and necessary consequence of the criminal misconduct of one of their own officers. Their respective claims are therefore to be ascertained on the application of strict principles of law to the state of facts which had occurred, and which existed at the time when the perpetration of the fraud was discovered.

There can be no doubt or uncertainty, nor is any difference of opinion entertained, as to what the rule and principle of law applicable to the case is. This is perfectly well settled. The *bona fide* holder of negotiable paper, payable to bearer or indorsed in blank, who has taken it innocently in the due course of business and for a valuable consideration, may recover upon it, though it came to him from a person who had robbed or stolen it. So if a promissory note or bill of exchange is made without consideration, or is lost or stolen, and is afterwards negotiated to one having no knowledge of these facts, for a valuable consideration and in the usual course of his business, it thereupon becomes his property, his title to it is indisputable, and he may recover the amount of it from the drawee or maker. 3 Kent Com. (6th ed.) 79. *Wheeler v. Guild*, 20 Pick. 545. *Stevens v. Blanchard*, 3 Cush. 169. This is peculiarly true in reference to bank bills or notes which circulate as currency; and so it was expressly adjudged in the early case of *Miller v. Race*

1 Bur. 452. And this principle, stated in the plainest terms in the opinion pronounced in that case by Lord Mansfield, has never since been questioned, but has been uniformly approved and upheld, and is now everywhere the acknowledged doctrine of the law. No more direct or positive decisions in affirmance of it can be found than in the adjudications of this court. Thus in the case of the *Worcester County Bank v. Dorchester & Milton Bank*, 10 Cush. 488, which was action brought upon a bank bill of the defendants for fifty dollars, which had never been issued by them, but which in a complete state of preparation for issue had been forcibly stolen from the vault of their banking house, it appearing that the plaintiffs obtained and came by the bill fairly, it was determined they were entitled to recover, although they had been informed of the robbery before commencing their suit; and judgment was accordingly rendered in their behalf. In the later case of *Wyer v. Dorchester & Milton Bank*, 11 Cush. 51, upon an exactly similar state of facts the same doctrine was again distinctly affirmed; and it was there also held, in conformity to repeated decisions to the same effect in other courts, that the mere possession of a bank note or bill, in the absence of any evidence to control or explain it, affords a conclusive presumption that it was received by the holder for value in the due course of trade, and that he is in such case to be considered the true and lawful owner. *Solomons v. Bank of England*, 13 East, 135. *King v. Milsom*, 2 Campb. 5. *De la Chaumette v. Bank of England*, 9 B. & C. 208.

But no question arises here concerning the burden of proof, for there is no dispute or controversy concerning the facts, which are all clearly developed in the evidence, and perfectly well known. It is therefore necessary only to ascertain the legal effect and consequence of these facts, and whether they show, as the defendants contend that they plainly and incontrovertibly do, that they received the particular bank bills demanded of them and to recover the value of which this action is prosecuted in the usual course of their business, for a valuable consideration and in good faith, without notice, direct or constructive, of the fraud by means of which they were obtained from the plain-

tiffs. If this is shown, then, on the application of the above stated principle of law, it results as a direct and necessary consequence, that by the transfer to them under such circumstances they became the owners of the bills by a complete and indisputable title. The investigation of the several parts of this general proposition involves the inquiries, when, from whom, and for what consideration, did they receive the bills; did they receive them in good faith; and had they at the time of receiving them any notice, direct or constructive, of the fraudulent means by which Hooper had obtained them.

1. These bills were first received by the defendants at the time when, upon the call of the directors upon Hooper for the cash for which he was accountable, they were carried into the directors' room, and were there delivered to them to be, with the other bills and checks produced at the same time, by them examined, counted and disposed of as the property of the bank. Before and up to that moment, these bills were in his possession and under his sole control. He had indeed placed them for safe keeping in the drawer in which he kept the bills and money of the bank, but he had not passed or attempted to pass them or the property in them to the bank or to any one else until he produced and delivered them to the directors. He procured and kept them strictly for a purpose of his own, and that purpose was simply and solely to exhibit and deliver them to the directors when he should be called upon to account, and when he should profess to account, for the balance of cash charged to him on the ledger, and for which he was, and knew that he was, at all times accountable. He retained them himself, and had it now in his own power, without any obstruction or hindrance from any other person, at any moment before they were so passed over and delivered to the directors, to take them away and restore them to the plaintiffs. And if he had done so, as he might and as he certainly ought to have done, he would not thereby have interfered with the property, or violated any of the rights of the defendants. For as he had the sole and exclusive possession of these bills, and continued to retain and maintain the custody of them until in accounting for his own

Atlantic Bank v. Merchants' Bank.

liabilities to the bank he passed them over to the directors, the defendants certainly could not before that was done have received or acquired any title to them.

2. When the defendants thus through their directors received these bills of Hooper, they took them in the due course of their business, and for a valuable consideration. The examination of the assets of the bank, and everything which was done by the directors on the afternoon of the 26th of March, were in accordance with the established practice and the course of proceeding prescribed by the express agreement of the board. The definite and exact object of all such examinations, and particularly of that which was made that day, was to ascertain if the bank was in the actual possession of all the money to which, according to the balance charged on the ledger, they were entitled. And as it is the business of the teller to keep all the cash, and his duty to produce and deliver it to the directors on their demand, such an examination and count of the bills and money by them necessarily involves the full accounting by the teller for the whole cash of the bank, according to his official and personal liability. And accordingly Hooper, being called upon for this purpose, in conformity to the established practice and usual course of proceeding in such cases, produced and delivered to the directors various checks and bills, and among them those which he had fraudulently obtained from the plaintiffs, as the property of the bank. The directors received them all, counted them all, and treated them all, as such, making no distinction, and knowing of none, between the different parcels of which the whole consisted. And in the unsuspecting belief and confidence that all the bills, thus delivered into their possession by Hooper to be examined and counted by them, belonged to the bank, that all was right, and that he had in this way fully accounted for all the money entrusted to his care, and had thereby discharged himself of all his liabilities relative thereto, they accepted the bills and checks so received of him for the bank in full satisfaction and discharge of those liabilities. And thereupon, in exercise of their official discretion and authority, they redelivered to Hooper all the bills they had received from him, that he might

thereafter keep them for and as the property of the bank. This, as is positively stated in the testimony of both Haven and Fay, they would not have done, if upon their examination there had appeared to be any deficiency in the amount of money which ought to have been found in the possession of the teller; much less, if they had known or suspected that he was a fraudulent defaulter.

It is thus shown that these particular bills, together with all the other bills and checks produced and delivered by Hooper to the directors, the whole being indiscriminately intermingled so far as they could perceive, were received by them for and on behalf of the defendants in consideration of his liability and indebtedness to them for the balance of the money which he had theretofore received, and for which he was then immediately responsible, and that those bills were thus accepted in full discharge of all such liabilities on his part up to that time. That, of course, was a full and valuable consideration.

But in another aspect of these transactions, it has been argued on behalf of the plaintiffs that the defendants did not pay or allow any consideration for these bills; because Hooper did not pay them in direct and avowed satisfaction of the indebtedness which resulted from his defalcation, but used them only to conceal it by diverting in that way for a brief period the attention of the directors, so that they would make no inquiries upon the subject; and because the directors, not knowing of any such defalcation, could not have accepted or received them in payment or discharge of the consequent indebtedness. Without doubt, it was the intention and design of Hooper to cover up and conceal his fraud and defalcation from the knowledge of the directors. But it is equally plain and certain that to effect this purpose he did in fact pass over to them and into their possession all the bills which he delivered to them, in order thereby to account in full for his entire liability for the whole of the money which had been intrusted to him, and for which he was responsible. They received and accepted these bills in due course, and gave to him a corresponding credit and discharge therefrom. Thus in this one material and decisive particular

each of the parties intended that the bills should be applied to one and the same object. That object was the accounting for, and the consequent settlement and satisfaction of their claim for the balance of cash charged in the ledger; for which balance he then admitted himself to be liable, and the amount of which they were entitled in any event to recover, equally whether they knew, or whether he had in fact been guilty, of any defalcation or not. It is therefore obvious and certain that all the bills which he delivered to the directors, and which they, acting in good faith, received and accepted for that purpose, were transferred to the defendants in satisfaction of their claim and of his liability therefor, and consequently were taken by them upon a good, valuable and adequate consideration.

3. And in accepting all the bills which were delivered to them for that purpose, it is clearly shown that they acted in the most perfect good faith. The directors not only had a right, but it was their duty, from time to time, and at all such times as they should to that end appoint, to call upon the teller to account for the cash and funds entrusted to him and committed to his keeping. In the exercise of that right, and in the usual and ordinary course of proceeding in all like cases, they called upon Hooper to produce and submit to their inspection and examination the money of the bank in his possession. In compliance with that call, he produced and delivered to them divers parcels of checks and bank bills, the aggregate of which they found upon careful scrutiny to be equal to, and exactly to correspond with, the amount of his liability according to the balance charged upon the ledger. They had not the slightest suspicion of his integrity in that or in any other transaction, or that all the bills exhibited and delivered to them did not justly belong to the bank, or that any part or parcel of them had been in any manner obtained of any person by fraud, or by any fraudulent means or practice. Such is the positive testimony of Haven and Fay; and there is nothing in any part of the evidence having the least tendency to create any distrust of the truth of their assertions. Indeed, nothing of this kind is suggested or pretended. If there were any such pretence, the significant fact that at the close of

their examination they unhesitatingly returned to Hooper all the money of the bank, to be kept by him as before, would be quite sufficient to refute it. This affords the strongest proof that they had no suspicion of him, and that their confidence in his uprightness and integrity remained unimpaired. It is easy to believe them when they say that, if any deficiency had been discovered, none of the cash would have been again and at once intrusted to him; but in view alike of their duty and interest, and of the motives which would probably influence all men in the like circumstances, we may be sure that if they had suspected or found cause to suspect that he had robbed their own, or had been an active participant in a conspiracy with others to rob or embezzle the funds of any other institution, they would not for a moment have thought of again placing their money in his possession, and of affording him thereby further and renewed opportunities to cheat and defraud them.

It is thus clearly proved, and it is in fact substantially conceded by the plaintiffs, that the directors who, in behalf of the defendants, were the immediate recipients of the money paid over to them by Hooper in accounting for his official liability, acted with the utmost fairness and integrity; and that neither they, nor any officer, agent or other person in the employment of the bank, had any direct notice of any of the wrongs which he had committed or of the frauds which he had perpetrated. It follows, as a necessary consequence from these proofs and concessions, that the defendants had no notice at all of the fraudulent means and acts by which he procured the money, unless they are to be affected by an alleged constructive notice, on the ground that the money fraudulently obtained by him came to them through his hands as one of their officers.

It is no doubt true that in general the principal is to be affected by the acts, conduct and knowledge of his agent, when the latter is acting for him, on his account, or within the scope, limits or powers of the agency. But it is not true that he is to be so affected, where one who is for some certain, special, definite and carefully prescribed purpose constituted an agent, does acts which are not within the scope of his duty or authority as

such, but wholly beyond and different from it; and does them solely and exclusively for himself and for his own benefit and advantage. In all such cases he alone is responsible. All the consequences of his acts attach exclusively to him, and are not to affect or to be shared in by any other person who, for other and wholly different purposes, may stand to him in the relation of a principal.

As soon as these plain and familiar rules are applied to the facts in the present case, it becomes at once apparent that the defendants cannot be charged with constructive notice on account of the knowledge of Hooper of his own misconduct and criminality. In nothing that he did to carry out, with the aid of his guilty associates, his premeditated scheme of fraud and deception, either in obtaining the money from the plaintiffs, in secreting it for a brief time in his own drawer, or in the exhibition and presentment of it to the directors, was he acting or assuming to act in his official character or relation, or as an officer or agent of the defendants. On the contrary, his position and proceedings were in every respect adverse and antagonistic to them. He acted solely for himself, and for the accomplishment of his own secret and unlawful purposes; exclusively for his own interest, his own protection, and to secure to himself continuance in office, and thereby renewed and prolonged opportunities of dealing with their money at his own pleasure and in execution of his own fraudulent designs. He meant to deceive them; he got the money and used it for that purpose. He undoubtedly intended, first to pay it to the bank in satisfaction of his liabilities, and, as soon as possible afterwards, to withdraw, embezzle and apply it to his own use. And if the hour of detection and exposure had not suddenly and unexpectedly occurred, he probably would, as he promised his associates, have withdrawn the same or an equivalent amount of money, and have restored it to the plaintiffs. But he was detected and lost the opportunity of consummating his intentions in this particular; and his failure and miscarriage at last cannot qualify or affect the rights of the defendants or the character of his own preceding acts. These fraudulent acts of his having

Atlantic Bank v. Merchants' Bank.

been in every respect, in deed and purpose, hostile and contrary to his duty towards them, and concealed, as they were intended to be, wholly from their knowledge, are not to be construed as affording constructive notice to them of the way and manner in which he obtained the money which they in good faith received from him.

From these considerations it appears to me to be clearly and conclusively shown that the inferences and the only inferences which a jury would be warranted in deducing from the evidence and from the facts proved or conceded on the trial are, that the money which Hooper fraudulently obtained from the plaintiffs was delivered by him to and received by the defendants in the usual and ordinary course of their business, for a full and valuable consideration, in good faith and without notice, direct or constructive, of the fraud perpetrated by him in obtaining it. This proposition being established, the necessary legal conclusion from it is that, when the money was so received by them, they acquired a perfect and complete title to it, and that no action can be maintained to recover it from them. I think therefore that, in pursuance of the agreement of the parties, judgment should be entered for the defendants.

In this conclusion, for the reasons before stated, I am authorized to say that Mr. Justice Bigelow fully concurs.

*Judgment for the plaintiffs.**

* See *Skinner v. Merchants' Bank*, 4 Allen, 290.

SAMUEL HENSHAW & another *vs.* BANK OF BELLOWS FALLS.

A railroad corporation, empowered by law to mortgage their franchise and property, after making a mortgage of all their lands, franchise and privileges, and "all the locomotive engines, cars and other articles of personal property whatsoever, now owned or used by the corporation, or which they may hereafter own or use," authorized their directors to issue bonds to the amount of \$1,200,000 to pay debts contracted in building and furnishing their road, and to secure such bonds by "an additional or second mortgage of the road, franchise and property of every description, including cars and engines," subject to the first mortgage, and "as full and complete" as that. Pursuant to this authority, bonds were issued, and a second mortgage made of all the lands, franchise and privileges of the corporation, "and the property and premises whatsoever, mentioned, specified, described or referred unto in the" first mortgage. *Held*, that the second mortgage, as against a subsequent attachment, conveyed engines and cars acquired by the corporation after the first and before the second mortgage.

The objection that one of the plaintiffs in an action brought by trustees had not accepted the trust at the date of the writ cannot first be taken at the argument before the full court upon the report of one of the judges.

The president of a railroad corporation, authorized by vote of the corporation to execute and deliver, and "do and perform all other acts and things necessary to give validity and effect to" a mortgage of the road, franchise and property of the corporation to trustees for the benefit of bondholders, executed, upon the eve of the failure of the corporation, a deed of surrender of the whole road and property to the trustees, who, upon the failure of the corporation, took possession of the road and property, and afterwards kept exclusive management and control thereof. *Held*, that the trustees thereby obtained and kept actual possession of the property, as against subsequent attaching creditors; although the laws of the State required not only delivery, but continuous and exclusive possession of the grantees, to perfect such a title; and although the trustees continued to employ in the management of the road the same persons who had been employed by the corporation; and although the mortgage provided that the trustees should permit the corporation to retain the exclusive use and possession of the property until some default in paying the principal or interest of the bonds, which had not yet occurred.

In an action for attaching property on mesne process against a third person, which remains in the plaintiffs' possession after the attachment and until judgment and execution, the measure of damages is the value of the property at the time of its being taken on execution.

ACTION OF TORT by Samuel Henshaw and William Raymond Lee, trustees under a second mortgage of the Rutland and Burlington Railroad, for the conversion of five locomotive engines, and the tenders and tools used about them, four passenger cars, and other chattels, formerly belonging to the railroad corporation and alleged to be the plaintiffs' property. Writ dated February 4th 1854. Trial at November term 1856 before

Henshaw & another v. Bank of Bellows Falls.

Thomas, J., who reported the case for the consideration of the full court.

S. Birtlett & J. P. Putnam, for the plaintiffs.

R. Choate, B. R. Curtis & S. E. Sewall, for the defendants.

MERRICK, J. This suit is prosecuted to recover the value of the locomotive engines, tenders, passenger cars and other articles enumerated in the writ. It is agreed that all these articles were formerly owned by the Rutland and Burlington Railroad Company, a corporation having its charter from the legislature of the State of Vermont. Both of the parties to the present suit derive the right and title upon which they respectively rely from that company. The defendants having obtained an execution against them upon a judgment rendered in a court of competent jurisdiction in the State of Vermont, caused the locomotive engines and other articles now in controversy, the same having been previously attached on mesne process, to be seized and sold thereon in satisfaction of the same. But the plaintiffs contend that, prior to the time when the attachment in that suit was made, they had acquired a right to all this property, which could not lawfully be interfered with or disturbed by the defendants. The attachment in their suit against the railroad company was made on the 31st of January and the 1st of February 1854, and the instrument of conveyance under which the plaintiffs claimed to derive their title was executed on the 1st of August 1853. If therefore that instrument was of legal validity and did by its terms transfer and convey the property and chattels now in question to the plaintiffs, and if they thereupon did whatever was necessary by the laws of the State of Vermont, where the instrument was executed, and where the property which it purported to convey was situate, to perfect in them a good and complete title as against all subsequent purchasers and attaching creditors, it is obvious that the plaintiffs are entitled to prevail in this action; because, being prior in point of time, their right is paramount to any which could be exercised by the defendants under their writ of execution.

By the laws of the State of Vermont "every railroad corporation shall have power to issue their notes or bonds for the pur-

Henshaw & another v. Bank of Bellows Falls.

pose of building or furnishing their roads, or paying any debts outstanding for building or furnishing the same, bearing such a rate of interest, not exceeding seven per cent., and secured in such manner, as they may deem expedient." Compiled Sts. c. 194, § 13. At a meeting of the stockholders of the Rutland and Burlington Railroad Corporation, held on the 8th of June 1853, authority was given, by resolutions duly adopted, to the directors of the company to issue bonds, obligations or promissory notes, at their discretion, to an amount not exceeding twelve hundred thousand dollars, bearing interest at a rate not exceeding three and one half per cent. semiannually, to be applied in payment of debts contracted in building and furnishing their road. And in like manner further authority was given them to secure the payment of all the bonds, notes and obligations which should thus be issued, by executing to such persons as they should select as trustees, in trust for the use and benefit of the holders of those bonds, notes and obligations, "an additional or second mortgage of the road, franchise and property of every description, including cars, engines, station houses and wharves." This was, by the terms of the vote, to be subject to the first mortgage which had been made by the company, and to be made "as full and complete, with like reservations," as that mortgage. The president of the corporation was also authorized to execute, acknowledge and deliver the mortgage, and (which it may be material hereafter particularly to consider) "to do and perform all other acts and things necessary to give validity and effect to said conveyance."

In pursuance of the authority thus vested in the president and directors of the corporation, bonds to a large amount were issued, and the indenture of two parts bearing date the 1st of August 1853, reciting the votes by which these powers had been conferred, was duly executed by and between the corporation of the first part and Samuel Henshaw and Joshua Thomas Stevenson of the other part.

The counsel for the defendants were not, at the argument of this cause, disposed to deny, and we think they were perfectly right in admitting with candor that it could not fairly be denied,

that it was the purpose of the legislature to enable railroad corporations to mortgage their franchises and property, even though the effects of such a mortgage would be, when foreclosed, to deprive the corporation of the necessary means to perform their corporate duties to the public. And no suggestion is made of any irregularity or of any want of due formality in the execution of the deed of indenture of the 1st of August, the object and purpose of which were to afford security for the payment of the bonds and obligations which the directors had issued and proposed to issue in pursuance of the resolutions adopted at the meeting of the stockholders.

The authority of the directors to cause to be executed the indenture of the 1st of August is thus proved; and that instrument having been in fact executed with all due formality, the first question which arises has relation to the particular articles of property it purports to convey. It is conceded by the plaintiffs that of the several articles enumerated in their writ, three of the locomotive engines and one of the cars were not owned by the railroad corporation when the first indenture of mortgage was executed; and the defendants therefore deny that these passed to the plaintiffs by the second indenture. This last mentioned instrument conveys to the persons therein named as trustees "all the lands, buildings, tenements, hereditaments, franchise, road, rights, easements, immunities and privileges whatsoever, and the property and premises whatsoever, mentioned, specified, described or referred unto in the indenture first before mentioned," that is, in what is termed the first mortgage deed. On recurring to that deed to which the description in the indenture of the 1st of August 1853 refers, it is seen that it purports and professes to convey not only the lands, franchise, and privileges of the corporation, but also "all the locomotive engines, cars, machinery, tools, implements, utensils and other articles of personal property whatsoever, now owned or used by the corporation, or which they may hereafter own or use." Now it may be considered very certain, as matter of law, that this instrument did not and could not operate at all as an instrument of conveyance of personal property not then in existence or not

Henshaw & another v. Bank of Bellows Falls.

then owned by the corporation. *Barnard v. Eaton*, 2 Cush. 294. *Codman v. Freeman*, 3 Cush. 306. But it may be considered equally certain, as matter of fact, that it was the intention of the corporation, or of those of its officers by whom the deed was executed, that it should have that effect and operation; and that after acquired personal property of the kind there mentioned should, equally with that then in existence and owned by the grantor, be thereby transferred to the grantee. Subsequently acquired personal property, such as locomotive engines and cars, is there very clearly and distinctly referred to. And by the indenture of the 1st of August 1853 the corporation convey, in direct terms, not only all the personal property "mentioned," but also all that which is "referred to" in the first indenture. When the circumstances under which the second indenture was made, and the objects and purposes of it are considered; that there was then outstanding a first mortgage to protect the creditors of the corporation in relation to any large sums of money in which they stood indebted; that the amount of the notes and bonds which were to be issued under the security of this second indenture might reach the sum of twelve hundred thousand dollars; it is obvious that the words of conveyance used in it were intended to cover all the available property which was, or which might be, in the possession of the corporation. As it purported to convey all locomotive engines and cars referred to in the former mortgage, and as that mortgage did in the most distinct manner refer to subsequently acquired property of this kind, we think that upon a true construction of its language, those three locomotive engines and one car acquired by the corporation after the execution of the first passed to the grantors under the second indenture.

But the defendants now object that whatever passed to the grantees under the indenture of the 1st of August, no action can be maintained by the present plaintiffs for the unlawful conversion by the defendants of any portion of the property thereby conveyed, because at the time of the alleged conversion Mr. Lee, though he had been duly appointed a trustee in the place of Mr. Stevenson before, did not actually accept and take upon him-

self the trust until after, the attachment made by the defendants of the property in question on their writ against the railroad company. To this objection the plaintiffs reply, and we think their reply is a sufficient answer, that it is not open to them upon the report. No such question as that was reserved at the trial. The report expressly states that no objection was raised to the evidence offered by the plaintiffs, except those particularly specified; and the question which arises upon the objection now urged is neither an objection to evidence, nor is it anywhere to be found mentioned among those reserved for the consideration of the full court. It ought not therefore now to be allowed. It is easy to see that if the objection had been taken at the trial, it might have been readily disposed of by the introduction of evidence showing that in fact Mr. Lee accepted the trust at an earlier date than that mentioned in the written memorandum which is in the case. Or, if necessary, an amendment which would have obviated the objection might have been granted without affecting in the least degree the merits of the case. Without therefore determining whether any effect would or ought to have been given to this objection, if, upon the evidence reported, it was properly or in fact before us, it seems clear that, no such question being reserved or intended to be reserved in the report, it is matter upon which we are not called upon to pass, and of which the defendants cannot now avail themselves.

But the further question, whether under the indenture of the 1st of August 1853 the personal property which it purported to convey was actually delivered to the grantees and afterwards remained in their open, visible and exclusive possession, is more elaborately considered and discussed in the written arguments of the counsel than any other which arises upon the report of the case. But upon the facts there disclosed it does not seem difficult of solution. The authorities to which reference is made in those arguments, the citations of which need not here be repeated, show very conclusively that, by the laws of the State of Vermont, the conveyance of personal chattels by deed of mortgage, bill of sale, or any other instrument, to be held in trust

Henshaw & another v. Bank of Bellows Falls.

by the vendee or grantee as security for the payment of a debt due to him, will not avail against a subsequent attachment thereof, unless he has previously thereto obtained a delivery of the chattels and has thenceforward been in the open, visible and exclusive possession of the same.* In conformity then to this rule, which must be regarded as absolute and inflexible, the burden of proof is upon the plaintiffs to establish the truth of this general proposition; that they did, before the attachment made by the defendants, obtain the possession of the personal property conveyed to them by the Rutland and Burlington Railroad Company, and did afterwards constantly remain in the open, visible and exclusive possession of it. And it appears to us that, upon a consideration of the facts stated in the report, that burden is fully sustained, and that the truth of this proposition is a just and necessary consequence from the evidence in the case.

The deed of indenture was executed on the 1st of August 1853. The grantees did not then take possession of any part of the mortgaged property, but the whole of it remained in the possession of the grantors until the 19th of November then next following. On that day the railroad company stopped payment; and since that time no business pertaining to the running of trains, the transportation of passengers or freight upon the road, or the care, custody and management of the engines, cars and other mortgaged property, has been transacted by any person in the employment or under the control or direction of the corporation or of any persons acting as their officers. Yet all this property was afterwards in constant use, and was employed by the persons who then had it in custody, just in the same manner as it had been before by the corporation, in the transportation of passengers and freight. But if this business was done in fact, and

* Upon this point the plaintiffs relied on *Kendall v. Samson*, 12 Verm. 515; *Hall v. Parsons*, 17 Verm. 271; *Coty v. Barnes*, 20 Verm. 78; *Stephenson v. Clark*, 20 Verm. 624; *Hutchins v. Gilchrist*, 23 Verm. 87, and cases cited; *Burrows v. Stebbins*, 26 Verm. 659; and the defendants, on *Tobias v. Francis*, 3 Verm. 425; *Woodward v. Gates*, 9 Verm. 358; *Sturgis v. Warren*, 11 Verm. 433; *Russell v. Fillmore*, 15 Verm. 130; *Skiff v. Solace*, 20 Verm. 279.

none of it was done by the corporation, or by any of their officers, or by any persons under their direction — and this must be taken as an indisputable fact, since it may be said, without qualification, that it is shown to be so by all the evidence in the case — the inquiry necessarily arises by whom else was it done, and who had possession of the property. These inquiries it is not difficult to answer.

On the 16th of November 1853, Mr. Lee, as the president of the corporation, in pursuance of a vote of the directors at a meeting held by them on the same day, executed with Messrs. Henshaw and Stevenson, the grantees and trustees under the deed of indenture of the first of August, a further deed of indenture, whereby the mortgaged property was surrendered and yielded up to them, to be held solely for the uses and purposes for which it was conveyed. It is insisted by the counsel for the defendants, that this whole proceeding was unwarrantable and illegal; that the vote of the directors was invalid, because it was adopted at a meeting held at a place beyond the jurisdiction of the state under which the corporation held their charter; and that the act proposed thereby to be done was beyond their power or right to authorize. But whether this should so be determined was a matter of law or not, it is indisputable in point of fact, that the deed of surrender, as it is called, was then executed by the parties; and that three days afterwards, to wit, on the 19th of November, Messrs. Henshaw and Stevenson proceeded to take possession of all the mortgaged property of every description. They appointed an agent to act for them in that behalf; and he went, under their special and written directions, to every place where any of this property was then situate or to be found, and took possession of it for them, and gave notice thereof in writing to every individual who had charge of any part of it. From that time forward the trustees had the exclusive control in the management of all the business over the road. The persons performing every species of labor upon or with it were in their employment, hired and paid by them, and subject to their control. This state of things remained unchanged until after the defendants made their attachment of the property now

in controversy. And thus it appears that the corporation were not then in possession of the property at all, but that the grantees had the sole, open, visible and exclusive possession of it under a claim of right, which claim was acquiesced in as indisputable by the grantors.

This meets the requirements of the law. The mortgaged property was in fact delivered to the mortgagees; they retained the possession of it, and applied it to the uses for which they were to hold it in trust. The objection that the agents and servants, whom they employed to take care of, manage and use the property, were the same persons who had been for the like purposes employed by the corporation, before the surrender and delivery of it, is wholly immaterial, and can in no way affect the rights of the parties. The trustees were obliged to employ suitable and proper persons to keep, take care and manage the machinery, cars and every other species of property, for which, coming into their possession, they were to be and remain accountable. For this purpose they had a right to employ whomsoever they pleased. If they did in fact employ those who had before been in the service of the company, they were not thereby any less in the actual possession of the property, than if they had sought for and procured the labor and services of other individuals. It is said that by this course of proceeding the public were not as effectually notified of the change of possession as they might have been. This is perhaps to some extent true, but less we think than upon first view might be supposed. How have the public any effectual means of determining at any particular time in whose employment are the persons seen in the performance of labor or service upon a railroad, except by the institution of inquiries in the proper quarter; by seeking information directly from one or the other of the parties to the contract? If that had been done by anybody after the change which took place under the direction of the trustees, it would at once and immediately have been known, for it is not pretended that there was any designed, intentional or actual concealment. The only ground upon which the defendants insist that there was no change of possession is, that the publicity of it by the adoption

of means other than those which were resorted to might have been greater or more distinctly diffused. But this extended publicity is no requisite of the law. It is enough, and all that is necessary to protect his rights against subsequent purchasers or attaching creditors, that the mortgagee has in fact obtained possession of the mortgaged property, and has afterward continued to be in the open, visible and exclusive possession of it for the uses and purposes for which it was transferred to him.

By the vote of the stockholders of the Rutland and Burlington Railroad Company at their meeting held on the 8th of May 1853, in addition to the other powers conferred on the officers of the corporation respecting the conveyance of its property by a second mortgage deed, the president was expressly authorized to do and perform all acts and things necessary to give validity and effect to the conveyance which the directors were empowered to cause to be executed. The great object and purpose of the corporation in that conveyance cannot, either in consideration of the terms in which it is expressed, or of the resolutions under which its officers were empowered to act, be mistaken. It was to give security to the creditors of the grantor, and ample power was conferred on the officers of the corporation to do, in their respective stations, whatever was essential to accomplish that object. It is true that the grantees were to hold the property conveyed to them in trust, among other things, for the use of the grantors until there should be a failure to pay some portion of the principal or interest of the debt to recover which the property conveyed was pledged. But special authority had been given to the president to make this conveyance to the trustees effectual to the security of the creditors, by doing all acts requisite for that purpose; and as this could be done only by surrendering and delivering up to the grantees possession of the mortgaged property, he had a right, and it may be said that it was his duty, to do that act. The facts proved in the case show that in this particular he conducted himself in good faith. The corporation were on the eve of failure; the creditors intended to be protected by the mortgage could be

Henshaw & another v. Bank of Bellows Falls.

made secure only by the exercise of the authority with which he had been invested ; and he therefore rightfully and properly gave up the possession of the mortgaged property to the trustees. It is immaterial how this was done ; it is sufficient that it was done in fact. He having in himself, in his own office, under the specific vote of the corporation, sufficient authority to deliver the property as one of the acts necessary to give effect to the conveyance, and having actually put the grantees in possession of it, it is unnecessary to inquire whether the directors proceeded with regularity, or transcended their authority in the vote which they adopted relative to the deed of surrender. Irrespectively of all their proceedings, the trustees had acquired by the act of the president a perfect title to the property against subsequent attaching creditors. And this is clearly so, notwithstanding the provision in the indenture that the trustees shall hold the conveyed property in trust to suffer and permit the grantors to retain the exclusive possession, use, management and control of it until the occurrence of a certain specified default in the payment of some part of the interest or principal of the several debts for the due security of which it was made and executed. For there are other trusts also created by it, the first and leading one of which is, that all the property therein mentioned shall be held and devoted to the security and ultimate payment of these debts. To execute each and all the trusts imposed upon the grantees by their acceptance of the conveyance made to them by the corporation, it was indispensable that they should have, as has already been shown, the actual, open and visible possession of all the personal property conveyed to them ; otherwise, the particular trust for the benefit of creditors might be wholly defeated by the interference of subsequent purchasers or attaching creditors. To prevent such consequences and to secure an appropriation of the property, so that it should not be diverted from a faithful application thereof in the execution of the several trusts created by the provisions of the indenture, it was the undoubted right of the grantees to take the property conveyed to them into their own sole and exclusive custody. Whenever the provisions of a contract create an obli-

gation against one of the parties to it in reference to specified property of which it is the subject, he is by necessary implication authorized to do all acts which are absolutely essential to the strict performance of his duty concerning it. If there be conflicting provisions, it is reasonable that those of minor importance should yield to the great and paramount purpose of the parties and to their object and design in its execution. And upon this principle it is apparent that the trustees ought to have taken possession as they did of the mortgaged property. The chief end for which the indenture was executed was manifestly to create a fixed security in behalf of certain distinctly designated creditors of the corporation, and that end could be effectually accomplished only by the course which the trustees pursued. Their possession of the property was therefore a right upon which they might lawfully insist. But aside from this conclusion, it is to be considered, in a controversy between the present parties, that the particular trust assumed by the trustees, to suffer and allow the grantors to remain until the occurrence of a specified contingency in possession of the mortgaged property, was a provision solely and exclusively for their benefit, and of which they only were entitled to take advantage. The plaintiffs have no cause of complaint when the terms of a provision, not made for them or on their account, but wholly for the use or advantage of the corporation, are not strictly observed, if the latter are satisfied and acquiesce in the omission. It will be in sufficient season to determine what are the rights of the *cestuis que trust*, and whether they have been violated, when the party in interest shall interpose objections to the proceedings of the trustees, or seek relief for any injury alleged to have been sustained.

Other questions have been adverted to in the arguments, upon which we have no occasion, in the determination of those upon which the rights of the parties in this case depend, to express any opinion. If in anything the railroad company, or their officers, have failed to perform in behalf of the public the duties required of them by law, proper remedies may no doubt be found; but nothing of that kind is shown by which the questions at issue in this action are affected.

The plaintiffs being, as has been shown, entitled to recover, it only remains to determine the principle upon which their damages for the unlawful conversion of the property taken by the defendants is to be ascertained. The existence of the first mortgage and the rights of the mortgagees under it present no impediment to the plaintiffs' recovery, because the latter were in the actual possession, and there is no evidence to show that the former ever took any possession whatever of the property. Of course they can prefer no claim to it against the subsequent purchasers. The rule of damages is therefore to be prescribed without regard to any supposed claim on their part. The general principle is, that in actions of trover and trespass for the unlawful conversion of personal property, the owner shall recover the value of it as it was at the time of the first wrongful taking, with interest afterwards from that date. If this rule were here to be applied, the plaintiffs would be entitled to claim the value of the property as it was on the day of the attachment thereof on mesne process, with interest afterwards. But under the particular circumstances of the present case we think that rule is inapplicable; and that it would be unjust to allow it to be enforced. The plaintiffs did in fact have the full and entire use of the engines, cars and other articles until they were seized by the sheriff on the execution. They are therefore to recover whatever the value of the property shall be ascertained to have been on that day, with interest thereon until the time of entering up the judgment. If the amount for which judgment, according to this rule, is to be entered is not agreed upon by the parties, the cause must be sent to an assessor to ascertain and report it.

Judgment for the plaintiffs.

**HARRISON GRAY OTIS vs. FREDERICK O. PRINCE & others,
trustees.**

A testator devised real estate to his grandson in fee; and by a codicil directed the estate to be held by trustees, "in trust to pay over to him quarterly the net income of said estate, so long as he shall remain unmarried; and, in the event of his marriage or his dying unmarried, to convey the estate to his heirs." *Held*, that the restraint upon marriage was against the policy of the law, and the gift over was void.

ACTION OF CONTRACT against the trustees under the will of Harrison Gray Otis, the plaintiff's grandfather, to recover a quarter's income of real estate devised to the plaintiff in fee by that will, but as to which a codicil contained the following provision :

"I so far modify my devise in said will to my grandson Harrison Gray Otis, Jr., that I direct the real estate, therein devised for his benefit, to be held in trust by my said three sons, the survivors or survivor of them, and his heirs, in trust, to pay over to him quarterly the net income of said estate, deducting all expenses for repairs and insurance, so long as he shall remain unmarried; and in the event of his marriage or dying unmarried, to convey the same to his legal heirs."

The plaintiff was afterwards legally married; and the trustees refused to pay the subsequent income to him. The parties stated the above case to the court.

E. F. Head, for the plaintiff, argued in writing.

F. O. Prince, for the defendants, submitted the case without argument.

THOMAS, J. By the original will the estate is given to the plaintiff in fee simple. The codicil devises the estate in trust to pay the net income to the plaintiff so long as he shall remain unmarried, and, in the event of his marriage or dying unmarried, to convey it to his legal heirs.

The condition is subsequent, and the restraint upon the marriage of the grandson without limitation as to time or person. It is therefore clearly against the policy of the law, and void, unless there is a valid gift over. *Parsons v. Winslow*

Whittenton Mills v. Upton & others.

6 Mass. 169. *Lloyd v. Branton*, 3 Meriv. 108. *Morley v. Renoldson*, 2 Hare, 570. 1 Jarman on Wills, 843. 1 Story on Eq. §§ 280, 288.

The trustees upon the marriage are to convey the legal estate to the heirs of the plaintiff. It is very familiar law that a devise to the heirs of one living is void. *Nemo est hæres viventis*. Shep. Touchst. 415. 6 Cruise Dig. tit. 38, c. 10, § 37.

There are exceptions to the rule, as well settled perhaps as the rule itself; as where, in the case of a devise, it is plain from the whole will that the testator intended to use the words "heirs" or "legal heirs" as words of description or purchase. Upon the examination of the will of Mr. Otis we find no manifestation of such purpose. Assuming that there was no inadvertency or mistake in the drafting of this clause, there are no clear indications that the words "legal heirs" were to be used in any other than their ordinary legal sense. The result is that the equitable devise over is void. *Heard v. Horton*, 1 Denio, 165.

Judgment for the plaintiff.



WHITTENTON MILLS vs. GEORGE B. UPTON & others.

A manufacturing corporation under the laws of this commonwealth cannot form a partnership with an individual.

A manufacturing corporation and an individual who have actually made a contract of partnership, and, either with or without the assent of all the stockholders of the corporation, acted and held themselves out to third persons as copartners for many years, and contracted debts as such, cannot, upon the petition of such individual, be put into insolvency as a partnership, under *Sts.* 1338, c. 163, and 1851, c. 327; and proceedings in insolvency so instituted will be suspended by this court upon the application of the corporation.

PETITION by a manufacturing corporation to set aside proceedings in insolvency, instituted against the corporation and William Mason, of Taunton in the county of Bristol, as partners, upon Mason's petition; to restrain the assignees appointed under those proceedings from further interfering with their estate; and

to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations. The facts of the case, as appearing by the report of a special master in chancery, were as follows :

The Whittenton Mills were incorporated by *St.* 1836, *c.* 19, for the purpose of manufacturing cotton goods at Taunton ; and, at the time of organizing under their charter, adopted by-laws, extracts from which are copied in the margin.*

The Taunton Manufacturing Company, a corporation authorized by their charter (*St.* 1822, *c.* 44) to manufacture iron, copper, cotton and wool, failed in 1836, and their property was divided among their creditors. The Whittenton Mill, one of their establishments, was taken by certain persons who had been stockholders in the Taunton Manufacturing Company and became stockholders in the Whittenton Mills corporation.

Leach & Keith and Crocker & Richmond, occupying a machine shop, foundry, tools and machinery which had previously belonged to the Taunton Manufacturing Company,

* The officers of the corporation shall be a treasurer, agent, clerk and three directors. The agents, under the authority of the directors, shall superintend and manage all the active business of the company — the erection of buildings, construction of machinery, purchasing stock, manufacturing and selling goods, and receiving and paying debts ; and they shall have power to make all such contracts as may be necessary for the purposes aforesaid, and to settle and adjust the same. The directors may call meetings of their board in such manner as they shall prescribe, and, at any such meeting, two shall constitute a quorum for the transaction of business. They shall have power to purchase mills and mill sites, and any real estate necessary or convenient for carrying on the business of the corporation. They shall have power to appoint agents, and remove them from office ; to appoint a clerk or treasurer *pro tempore* in case of vacancy or absence ; to appoint, or authorize the agent to appoint, all other needful officers under him ; to fix salaries and compensations for all the officers and agents employed by the company ; to direct the number and extent of buildings to be erected, the extent and kind of machinery to be constructed or purchased, and the extent and kind of manufactures to be carried on ; to declare dividends ; to call meetings of the corporation ; to instruct the agents and other officers, and regulate and control their doings, and exercise a general superintendence and control over all the officers of the corporation. Meetings of the directors may be holden at any time and place for the transaction of any business when all the board are present without any previous notice.

furnished the greater part of the machinery required for the Whittenton Mill from 1836 until 1842, when they failed, and their foundry, machine shop, tools, machinery and stock passed into the hands of officers of the law for sale and distribution among their creditors, and the tools, machinery and stock were purchased and the foundry and machine shop hired by Mason.

On the 28th of May 1842 the Whittenton Mills and Mason made an agreement in writing, that the corporation should advance to him the money necessary to pay for said tools, machinery and stock, and for the rent of the shop and foundry, and for the stock and labor which might be required in carrying them on, and be paid interest on the advances; and that, after paying a certain annual salary to Mason, the profits on patents then held or afterwards obtained by him, and all other profits derived from the manufacture of machinery or other work of the machine shop, should be equally divided between the parties, for five years. On the 1st of June 1845 the parties further agreed in writing that their joint business should be done and their joint property held in the name of William Mason & Company; and the shops hired by them and their stock of tools and machinery being insufficient, that land should be purchased, buildings erected and machinery and tools purchased or constructed forthwith to supply the deficiency; that Mason, besides an annual salary, should receive a certain sum on each spindle made by the parties under his patents, or sold to others; that the firm and their successors should have the right to use, without charge, all inventions and improvements in machinery made by Mason during the continuance of the agreement; that interest should be allowed to each party on all sums furnished for the use of the partnership; that the accounts should be stated annually, and be at all times open to the examination of the parties; that the profits, after deducting the allowance to Mason, should be equally divided between him and the Whittenton Mills; and that the agreement should continue in force for seven years from its date, unless sooner cancelled by mutual consent. And it was afterwards by agreement in writing extended for three years more.

It was a great convenience for the Whittenton Mills to have the control of a foundry and machine shop, situated, as this foundry and shop were, within two miles of their factory, and to have the right to use the patterns in the shop, and the patents of Mason. The officers of the corporation made these agreements with the sole object of realizing profits from the manufacture and sale of machinery, and at the time of executing the agreement of 1842 the Whittenton Mill was in full operation and was supplied with all the machinery required.

Under and in pursuance of these agreements, the firm of William Mason & Company, composed of Mason and the Whittenton Mills, carried on a very extensive business, (averaging \$175,000 a year, and amounting in one year to \$350,000,) confined to the manufacturing of machinery for cotton mills till 1852, when they built one locomotive engine. From this time, the manufacture of locomotive engines received an increasing share of their attention till their insolvency in 1857, when it constituted about one half of their business.

During the period of the partnership, the greater part of the machinery required by the Whittenton Mills was manufactured and sold to them by William Mason & Company. In the purchase and sale of this machinery the parties dealt with one another as strangers. Mason & Company also made repairs upon the machinery of the Whittenton Mills to the amount of \$4000 during that time. And Mason & Company manufactured and sold to other persons and corporations large quantities of tools and machinery; and stated and rendered to the Whittenton Mills, as partners, annual accounts of the copartnership business, which resulted every year until 1852 in large profits, half of which, according to the terms of said agreements, was paid over or credited annually to the Whittenton Mills, and was by that corporation distributed, with their other profits, among their stockholders. Since 1852 the firm have been doing a losing business.

The capital stock of the corporation was divided into two hundred shares, the par value of which was five hundred dollars. The nature of the business in which Mason & Company were

engaged, and the manner of conducting it, were throughout known to all the officers of the corporation; and to all the stockholders, except one, who was the owner of four shares from the time of the organization until 1854, when he transferred them to one of the other stockholders, and who never attended a meeting of the corporation, but was a relative of a majority of the officers and of the stockholders, and with two of them was in the habit of consulting on his business affairs, and greatly relied on their judgment.

At and for some time before the insolvency aforesaid, William Mason & Company were employed in making machinery, which they had contracted to furnish to the Whittenton Mills, to the value of \$35,000. The materials had all been procured, and the work was about three quarters done. It was generally known, in the shop of Mason & Company, and in the town of Taunton, and to many of the persons who furnished the materials and performed the labor on this machinery, that it was building for the Whittenton Mills. And debts for such materials and labor, to the amount of \$4000, have been proved against the estate of Mason & Company.

Mason contributed to the copartnership nothing but his skill and patent rights. The Whittenton Mills contributed all the capital required, and advanced to Mason & Company all the money to pay for the machinery, stock and tools originally purchased; and afterwards, from time to time, made further advances to pay the accruing rents, and for the stock and labor, as well as for the land purchased, and the tools and machinery required in carrying on the copartnership business, and were credited with these sums, and with interest thereon, in the annual accounts stated and rendered by Mason & Company. The advances were made with the expectation that they would be reimbursed out of the profits. The lands were all conveyed to William Mason and his heirs, but were purchased for copartnership purposes, and the purchase money was charged in the copartnership account.

The general agent of the corporation, (who was also their treasurer for a portion of the time,) and Mason, represented to

third persons, with whom the partnership was dealing, that the corporation was a member of the partnership. Two of the directors testified that they never heard a doubt suggested that this partnership was a valid one till said insolvency proceedings were commenced; and there was no evidence that its validity was ever questioned until that time, by any person. One person, acting under a power of attorney, executed by Mason, and by the Whittenton Mills through their general agent and with the knowledge of their clerk, on the 12th of January 1857, purporting to authorize him to use their partnership name "in signing and making checks and drafts and receipts, and indorsing drafts, checks, bills receivable, and bills of exchange," represented to those with whom he was negotiating for money and supplies for the shop that the Whittenton Mills was a member of the partnership, and upon the faith of such representations obtained money and materials to a large amount.

The Boston Manufacturing Company, incorporated in 1813, (*St.* 1812, *c.* 92,) "for the purpose of manufacturing cotton, woollen and linen goods," erected at Waltham the first power loom mill in this country; and have a machine shop, in which they made the machinery for their own mill and for the two cotton mills of the Merrimack Company, the first erected in Lowell; and have also made machinery, in large quantities, for cotton mills in Baltimore, Lowell and other places. The Elliot Manufacturing Company, incorporated in 1823, (*St.* 1823, *c.* 11,) "for the purpose of manufacturing cotton goods," furnished from their shop the machinery for one of the mills in Nashua, N. H. Cotton manufacturing companies generally have, connected with their mills, machine shops, or "repair shops," as they are called; and it is customary for such companies, when they have a good mechanic, and the patterns for a valuable machine, to furnish such machines to other factories.

This case was argued before all the judges on the 16th of June.

S. Bartlett & B. R. Curtis, for the petitioners. 1. A manufacturing corporation, created by a law of this state to carry on business therein, pursuant to the Rev. Sts. *cc.* 38, 44, cannot

Whittenton Mills v. Upton & others.

enter into a general copartnership with either a natural person or another corporation, even for the prosecution of the same business for which it was chartered. The powers of a corporation are only those expressly granted, and those implied, because needful, or, perhaps, usual and customary, for the ends which the corporation was created to attain. *Salem Milldam v. Ropes*, 6 Pick. 32. *Beaty v. Knowles*, 4 Pet. 166. Angell & Ames on Corp. §§ 229, 239, 256. The power to form a general copartnership is neither expressly granted, nor needful to transact the business of manufacturing.

The entire legislation of the State for the regulation of manufacturing corporations proceeds upon the assumption that each corporation will conduct its own several affairs separately, by means of its own duly appointed officers and agents, acting in the name and behalf of the corporation; and its interests and affairs cannot be committed to a partnership, and conducted under the rules and principles which govern partnership business and liability, without violating the public policy of the State, exhibited by its legislation, and removing the safeguards erected for the security of those who may become creditors of the corporation. Rev. Sta. c. 38, §§ 1, 2, 22, 25. In a partnership, the individual partner, (in this case Mason,) might do anything, within the scope of the business, not only without the concurrence of the directors, but against their will.

2. If this manufacturing corporation had power to enter into a contract of copartnership, it could not make this contract for the prosecution of a business foreign to the only purpose for which it was created, which was "for the purpose of manufacturing cotton goods in the town of Taunton, in the county of Bristol; and for this purpose" only it was to "have all the powers and privileges, and be subject to all the duties, restrictions and liabilities set forth in the" Rev. Sta. cc. 38, 44, and might hold real and personal estate to a certain amount. *St.* 1836, c. 19. It could not take or hold real or personal estate, either jointly or severally, for an object foreign to that business *First Parish in Sutton v. Cole*, 3 Pick. 240.

Its charter binds its capital and credit solely to the purpose

of making cotton cloth. This charter is one of the public laws of the State. Every person who deals with the corporation in its legitimate business has the right to assume that to be its only business; and the application of its capital and credit, through a partnership, to a distinct and different branch of business, is in direct contravention, not only of public policy, but of the express provisions of the public law of its creation. *Bagshaw v. Eastern Union Railway*, 2 Macn. & Gord. 389. *Beman v. Rufford*, 1 Sim. N. S. 550. *Colman v. Eastern Counties Railway*, 4 Railw. Cas. 513, and 10 Beav. 1. *Caledonian & Dumbartonshire Junction Railway v. Magistrates of Helensburgh*, 2 Macqueen, 391.

3. The assent of all the members of the corporation, if given, is unimportant. They could not enlarge the powers of the corporation, nor make that legal which was contrary to the express provisions of a public law. *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775. *Macgregor v. Official Manager of Dover & Deal Railway*, 18 Ad. & El. N. R. 618.

4. No creditor of Mason & Company can charge the corporation as a partner by reason of his dealings with the so called firm. The charter being a public law, every creditor, assuming to trust the corporation, either jointly or severally, is bound to take notice of it and its legal consequences, and so had notice that the corporation could not be a partner in this firm. This corporation could not empower an agent to sign either of the contracts of partnership. The attempt to do so was void, not merely for want of power, (as a similar attempt of a *feme covert* at common law would be,) but also because a violation of express law. *East Anglian Railways v. Eastern Counties Railway*, *ubi supra*. *Macgregor v. Official Manager of Dover & Deal Railway*, *ubi supra*. *Shrewsbury & Birmingham Railway v. Northwestern Railway*, 6 H. L. Cas. 113, 137. *Root v. Godard*, 3 McLean, 102. *Berry v. Yates*, 24 Barb. 199. *Mechanics' Savings' Bank v. Meriden Agency*, 24 Conn. 159. *Pennsylvania, Delaware & Maryland Navigation v. Dandridge*, 8 Gill & Johns. 248. *Sumner v. Marcy*, 3 Woodb. & Min. 112. *Angell & Ames on Corp.* §§ 229, 239. *A fortiori*, Mason himself, on whose peti-

tion the corporation were decreed insolvent, could not allege and set up the partnership.

5. If there was a valid subsisting partnership between Mason and the corporation, the insolvent laws of the Commonwealth do not authorize a decree, making the corporation legally insolvent, upon the petition of Mason. The *St.* of 1838, c. 163, is confined to natural persons, and has no reference to the insolvency of bodies corporate; the *St.* of 1851, c. 327, is confined to corporations, and has no reference to the insolvency of natural persons. *Sargent v. Webster*, 13 Met. 503. *Cheshire Iron Works v. Gay*, 3 Gray, 531. It would have been strange if the *St.* of 1851 had made provision for the insolvency of a partnership consisting of a natural person and a body corporate or two bodies corporate; for, if it is legally possible for such a partnership to exist, under the laws of this state, it was a very remote possibility and unlikely to be anticipated and provided for. The *St.* of 1851 has not only studiously omitted all provisions concerning partnerships, but has made an express provision in § 12 that the surplus, if any, after paying the debts of the corporation, shall go back to the corporation; which is necessarily inconsistent with the rights of joint creditors, and clearly shows they were not provided for.

E. R. Hoar & H. Gray, Jr. for the assignees. 1. A corporation has the same power as a natural person to make all contracts not prohibited by law, and which are necessary or usual in transacting the business which it is authorized by law to transact. The power to make a contract of partnership is not a distinct corporate power, to be created or conferred only by a special grant; but, like the appointment of an agent — and each partner is, as between themselves, an agent of the other — is only one mode or instrumentality of effecting the lawful objects for which the corporate powers were given. A corporation therefore may form a contract of copartnership to effect any purpose which it may lawfully accomplish by other means, agencies or instrumentalities. *Angell & Ames on Corp.* §§ 95, 96, 271, 272. *Canal Bridge v. Gordon*, 1 Pick. 304, 307. *Peckham v. North Parish in Haverhill*, 16 Pick. 287. *Old Colony*

Railroad v. Evans, 6 Gray, 38, 39. *Catskill Bank v. Gray*, 14 Barb. 479. *Catskill Bank v. Hooper*, 5 Gray, 584, 585. *Conkling v. Washington University*, 2 Maryland Ch. 508. *Shrewsbury & Birmingham Railway v. London & Northwestern Railway*, 17 Ad. & El. N. R. 663, 665, 2 Macn. & Gord. 353, and 6 H. L. Cas. 135. *Great Northern Railway v. South Yorkshire Railway & River Dun Co.* 9 Exch. 642.

This case falls within the principle upon which congress has been held to have the power to incorporate a bank, although no such power is expressly granted, and the Constitution declares that all powers not delegated are reserved. 1 Kent Com. (6th ed.) 249-254.

The Whittenton Mills are shown to have made and acted under agreements of copartnership with William Mason. "Trading corporations are affected, like private persons, with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and generally, by those legal and equitable considerations, which affect the rights of natural persons." *Melledge v. Boston Iron Co.* 5 Cush. 175.

2. The subject of those agreements was within the scope of the chartered powers. A corporation for the manufacture of cotton by machinery may make or repair, as well as purchase, the machinery which it has occasion to use. It may make this machinery in a machine shop which it owns or hires, either alone, or in connection with any other person or corporation. It may make this machinery, either by itself, or in conjunction with any other person or corporation, who desires and has lawful authority to engage in the manufacture of machinery. It is found, as matter of fact, to have been the custom of cotton manufacturing corporations, from the commencement of the cotton manufacture in this commonwealth, to manufacture machinery for their own use, and for sale in large amounts to others, without special authority by statute; and that the obtaining of machinery in this way was a great convenience and

Whittenton Mills v. Upton & others.

economy to the corporation in this case. *Ante*, 585, 587. The fact that the sole purpose of the officers who made these agreements on behalf of the corporation was to make money, cannot affect the validity of the partnership; because that was the object of all the business of the corporation; and because that object does not appear to have been disclosed to any parties with whom the partnership or the corporation transacted business.

Similar powers are lawfully exercised, and a like construction of the incidental and implied authority conferred by a charter is recognized, in analogous cases. A manufacturing corporation may own a water privilege, dam, warehouses, teams and carriages, weighing apparatus, a herd of cows to furnish manure for dyeing, fire engines, shares in an aqueduct, a reservoir and the like. Cannot it insure in a mutual insurance company, and thus incidentally engage in the business of insurance? Or keep a shop, as a convenient mode of paying its operatives, and allow other persons to purchase goods there? Or own a school-house, church, parsonage or hall for lectures or meetings? Or associate itself with other persons or corporations owning mill privileges on the same stream, in constructing a reservoir for their common benefit? And cannot a parish or religious society let rooms under its church for shops or schools, or its cellars for storage? *Chester Glass Co. v. Dewey*, 16 Mass. 102. St. 1814, c. 4. *Spaulding v. Lowell*, 23 Pick. 71. *Lowell Meeting-house v. Lowell*, 1 Met. 538. *The Banks v. Poitiaux*, 3 Rand. 136. In whom did the property purchased in the first instance for the partnership vest, if not in the firm?

3. The facts show that the nature of the business of the partnership and the manner of conducting it were known throughout to all the officers of the corporation; and to all the stockholders, except an owner of one fiftieth part of the stock; and he stood in such a relation to the others as to be bound by their knowledge, and had moreover ceased to be a stockholder three years before the insolvency. This assent of all the officers and stockholders of the corporation precludes any inquiry into the validity of the partnership, so far as concerns contracts already executed.

Canal Bridge v. Gordon, 1 Pick. 304. *Graham v. Birkenhead Lancashire & Cheshire Junction Railway*, 2 Macn. & Gord. 146. *Marsh v. Keating*, 2 Cl. & Fin. 289. *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142, 164.

4. If the corporation, in making this contract of partnership, exceeded its chartered powers, such violation of the charter can only be alleged by the Commonwealth, in proceedings against it for a forfeiture of the charter; and the validity of the contract cannot be called in question, or the rights of innocent third persons resulting from it interfered with, by its creditors or debtors, and least of all by the corporation. *Chester Glass Co. v. Dewey*, 16 Mass. 102. *Silver Lake Bank v. North*, 4 Johns. Ch. 373. *Moss v. Rossie Lead Mining Co.* 5 Hill, 137. *State of Indiana v. Woram*, 6 Hill, 37. *Quincy Canal v. Newcomb*, 7 Met. 276. *White v. South Shore Railroad*, 6 Cush. 412. *Leazure v. Hillegas*, 7 S. & R. 313. *Baird v. Bank of Washington*, 11 S. & R. 418. *The Banks v. Poitiaux*, 3 Rand. 136.

If there was a copartnership valid to any extent, it cannot be objected to the claims of those who have dealt with it in good faith, that the corporation has, in some respects, exceeded its chartered powers. *Eastern Counties Railway v. Hawkes*, 5 H. L. Cas. 338, 350, 368, 381, 382, and 1 DeGex, Macn. & Gord. 737. *Doe v. Horne*, 3 Ad. & El. N. R. 766. *The Queen v. White*, 4 Ad. & El. N. R. 111, 112. *Horton v. Westminster Improvement Commissioners*, 7 Exch. 780. *Allegheny City v. Mc Clurkan*, 14 Penn. State R. 81.

Most of the cases cited by the petitioners were either of refusals to enforce a contract in equity, not of active interference to set it aside; or they were cases of railroad corporations, which are public in their nature, and not like mere trading corporations. *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 404.

5. A corporation, which has formed a lawful contract of copartnership, or one which is obligatory upon it to any extent, or as to any persons, may be brought under the operation of the insolvent laws as a partner, upon the petition of its copartner, in conformity with the provisions of St. 1838, c. 163, § 21. The legislation of Massachusetts concerning persons is to be taken

to include corporations, whenever the same reasons will apply to them; and the purpose and effect of the *St.* of 1851, *c.* 327, were to follow out the policy of the *St.* of 1838, *c.* 163, and to extend the insolvent system of the Commonwealth, which had been previously limited to natural persons, to corporations, and thereby secure an equal distribution of all insolvent estates among their creditors. *Rev. Sts. c.* 2, § 6, *cl.* 13. *Dearborn v. Ames*, 8 Gray, 1. In *Cheshire Iron Works v. Gay*, 3 Gray, 531, there was a distinct remedy under the statutes, by application to this court. Neither of the statutes authorizes a creditor to initiate proceedings more extensive in their effect than either of his debtors could. If this petition of the Whittenton Mills can be sustained, there is no means by which the estate of this insolvent partnership can be brought under the operation of the insolvent laws of the Commonwealth. The effect would be to leave the insolvent system in this anomalous condition: Insolvent debtors are subject to it; insolvent partnerships are subject to it; insolvent corporations are subject to it; but an insolvent partnership, composed of an insolvent individual and an insolvent corporation, is beyond its reach.

THOMAS, J. This is a petition to this court, sitting in equity, and as such having, by the *St.* of 1838, *c.* 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated, if the corporation was capable in law of entering into and forming such partnership and for such ends.

But the petitioners say, first, that the Whittenton Mills could not enter into any legal partnership; secondly, that if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created; thirdly, that if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason and under the *St.* of 1838, *c.* 163, and the acts in addition thereto; such acts respecting only natural persons and making no provision for bodies corporate.

At the threshold of the cause and of its elaborate discussion is the question, Was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: Has a corporation, as one of its usual inherent powers, the capacity to form a contract of copartnership? The narrower question, but for this case the practical and pertinent one, is, Can a manufacturing corporation in this commonwealth, incorporated since February 1831, and subject to the provisions of the thirty-eighth and forty-fourth chapters of the revised statutes, enter into a contract or society of copartnership?

This corporation was created in March 1836 as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges and made subject to all the duties, restrictions and liabilities set forth in the thirty-eighth and forty-fourth chapters of the revised statutes, passed on the fourth of November preceding, but not to take effect till the first of May eighteen hundred and thirty six. *St.* 1836, c. 19. This charter, with the provisions of the chapters referred to and made part of it, is the origin and source of the powers and functions of the corporation. What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If then this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of c. 38 of the Rev. Sts. provides that the

business of every such manufacturing corporation shall be managed and conducted by the president and directors thereof and such other officers, agents and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company and to bind the corporation by his acts is vested in one not a member of the corporation nor its officer or agent. Such are the third, fourth and fifth sections, providing how the president and directors, and other officers, agents and factors of the corporation shall be chosen. Such too is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the limit fixed by law or to reduce it. §§ 9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation; the means of stating which would not be in their power if another principal had the power of creating the debts. § 22. Of the same character is the twenty-fifth section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess; a provision evidently based upon the ground that the exclusive power to contract debts is vested in such directors, and that they cannot be divested of it, and which is wholly in-

consistent with the existence of a power in the corporation to enter into a contract of partnership, by which another principal would be created, having equal power to contract debts and to bind the partnership and the corporation *in solido*.

Indeed the effect of all our statutes, the settled policy of our legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred, and the duties expressly imposed, upon a manufacturing corporation under the legislation of the Commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the St. of 1852, c. 195, not adverted to in the argument, corporations created for the manufacture of woollen and cotton goods are authorized to carry on certain other manufactures, but this only when four fifths of the stockholders shall, by vote at a special meeting called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered, did not exist before the statute was passed.

We are therefore all of opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void.

It is said however by the respondents that if this be so, such violation of the charter can only be alleged by the Commonwealth upon proceedings for a forfeiture of the charter, and that the validity of the partnership cannot be called in question by the corporation or by its creditors or debtors.

As the basis of proceeding against the Whittenton Mills in insolvency upon the petition of Mason under the St. of 1838, c. 163, § 21, even supposing that the provisions of that statute are not limited to natural persons, it was necessary to show the existence of an actual copartnership between Mason and the corporation. It was not sufficient to show that they had so conducted as to be liable to third persons as partners; they must be partners *inter sese*. *Hanson v. Paige*, 3 Gray, 239. There must be a contract of copartnership between them. Into such a contract the petitioners were incapable of entering.

But the case rests upon broader grounds. The charter of the corporation is part of the public law. Rev. Sts. c. 2, § 3. Those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership; that that contract was beyond the scope of its authority, and that this incapacity resulted from considerations not personal or peculiar to this corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and, while it imposes upon the stockholders of the corporation heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs.

The precise point at issue before us is the validity of these proceedings in insolvency. That depends, as before remarked, upon the existence of the partnership between the Whittenton

Mills and Mason. Upon that only could the petition of Mason be sustained.

It is not necessary for this purpose to decide how far these considerations will affect those claiming to be the creditors or debtors of the alleged partnership. It is in this point of view only, that the cases of *Chester Glass Co. v. Dewey*, 16 Mass. 94, *Quincy Canal v. Newcomb*, 7 Met. 276, and *White v. South Shore Railroad*, 6 Cush. 412, can be deemed material. They have the tendency to show the existence of a contract between the Whittenton Mills and Mason, which the former is estopped to question.

In the case of *Chester Glass Co. v. Dewey*, one ground of defence to the recovery for goods sold and delivered by the plaintiff corporation was, that the corporation was prohibited from trading. The court held, that the legislature did not intend to prohibit the supply of goods to those employed in the manufactory. That certainly was the end of the matter. The court however added, that the defendant could not refuse payment on this ground, but that the legislature may enforce the prohibition by causing the charter to be revoked. This suggestion will be entitled to consideration if a question should arise as to the right of the alleged company to recover for goods sold, but it certainly is not conclusive upon the relation of the partners *inter sese*.

In *Quincy Canal v. Newcomb*, it was held, that, where a canal was opened and toll claimed and the defendant used the canal, he was liable to the payment of such toll and could not avoid such payment by showing that the canal had not been made so deep as the statute required.

In *White v. South Shore Railroad*, it was held, that the defendants were liable for damages in constructing their road through and across a mill pond authorized by the general court to be raised in a navigable river, though in erecting the dam for raising the pond the condition of the act permitting it had not been complied with. The court said, that the railroad company could not take the petitioners' pond from them because the dam was not constructed in compliance with the act; that whether it had been so constructed was a matter between the government and the petitioner.

Bangs v. Lincoln & another.

If the assent of all the stockholders were shown to the formation of the partnership—which is not the fact—it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provision of the insolvent law of 1838, c. 163, and the acts in addition thereto.

The proceedings in insolvency founded upon the petition of Mason as the partner of said Whittenton Mills under the firm of William Mason & Company were illegal and must be vacated and set aside, so far as they affect the estate of the Whittenton Mills. A mandamus must issue to the judge in insolvency for the county of Bristol to proceed upon the petition of the Whittenton Mills, to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

EDWARD BANGS vs. EZRA LINCOLN & another.

The individual liability of stockholders of officers of a manufacturing corporation for debts of the corporation, under the Rev. Sts. c. 38, and St. 1851, c. 315, cannot be proved against their estates in insolvency.

APPEAL from a decree of the court of insolvency, disallowing a claim offered for proof against the separate estates of Charles H. Mills, James K. Mills, Samuel A. Eliot and Edmund Dwight, of which the defendants were assignees. The case was submitted to the judgment of the court upon the following facts :

The plaintiff's claim was for the amount of a bill of exchange, (which had been duly presented, and protested for non-payment,) drawn and indorsed by the Whittenton Mills, a manufacturing corporation duly organized under the *St.* of 1836, *c.* 57, subject to the provisions of the *Rev. Sts. cc.* 38, 44, and in which all said insolvents were and long had been stockholders in different amounts, and all but Dwight officers.

The capital stock of the corporation was duly paid in, but no certificate thereof was made and recorded as required by the *Rev. Sts. c.* 38, § 17; nor any annual statement of the amounts of assessments voted and paid in, and of all existing debts, as required by § 22; nor any notice ever given by either of said insolvents to the stockholders of the excess of the debts of the corporation beyond their capital, and of his absence when such debts were contracted, or of his objection thereto, pursuant to § 25.

The plaintiff on the 15th of December 1857 commenced two actions to recover the amount of this bill of exchange; one of contract against said corporation, in which said insolvents were summoned as stockholders; and the other of tort against them as officers of the corporation; in both of which the writs were served by attachment of real estate of the insolvents; and which are still pending. The first publication of notice of the issuing of a warrant in insolvency was on the 11th of January 1858.

B. R. Curtis & E. Bangs, for the plaintiff. By *St.* 1838, *c.* 163, § 3, "all debts due and payable from" an insolvent debtor "at the time of the first publication of notice of issuing the warrant may be proved and allowed against his estate."

1. Upon the facts stated the insolvents, as stockholders of the Whittenton Mills, were jointly and severally liable for all the debts of the company. *Rev. Sts. c.* 38, §§ 16, 22. This obligation imposed by law upon the stockholders is a debt. 3 Bl. Com. 158. *Bullard v. Bell*, 1 Mason, 298. *Bordman v. Osborn*, 23 Pick. 295. *Gray v. Bennett*, 3 Met. 522. *Harger v. McCullough*, 2 Denio, 123.

The *St.* of 1808, *c.* 65, § 6, simply allowed an execution against the corporation to be levied upon the individual stock-

Bangs v. Lincoln & another.

holders, without charging upon them any liability as for a debt; and was therefore held not to create a debt which could be proved against their estates in insolvency, either in their lifetime or after their death. *Kelton v. Phillips*, 3 Met. 61. *Ripley v. Sampson*, 10 Pick. 372. *Gray v. Coffin*, 9 Cush. 205, 206.

But the Rev. Sts. c. 38, § 16, like the St. of 1821, c. 38, expressly declare a liability of the stockholders to pay the debts of the corporation, without prescribing the remedy; and a new remedy was given by St. of 1838, c. 163, § 3 — by proof against the estate of the debtor — applicable to a different state of things from the remedies provided by the Rev. Sts. c. 38, and the St. of 1851, c. 315, and not affected thereby. In *Knowlton v. Ackley*, 8 Cush. 93, it was only decided, that particular remedies having been prescribed by statute, no other could be pursued.

Where a specific sum of money is absolutely due from the insolvent, it is a debt, within the meaning of this statute; and it is not material how or why it became due, nor by what form of action *in personam* the remedy must have been sought if insolvency had not intervened. *Ex parte Lingood*, 1 Atk. 240. *Marson v. Barber*, Gow R. 17. *Ex parte Harding*, 5 De Gex, Macn. & Gord. 367. *Langford v. Ellis*, 14 East, 202, note. *Ex parte Charles*, 16 Ves. 256, and 14 East, 198. 1 Eden B. L. (3d ed.) 132. *Utterson v. Vernon*, 3 T. R. 548, 549. *Chapple's case*, 5 De Gex & Sm. 400. Wordsworth on Joint Stock Companies, 8-11. *Ex parte Wood*, 1 Mont., Deac. & De Gex, 92. *Ex parte Marston*, Mont. & Chit. 576. *Twiss v. Massey*, 1 Atk. 67.

The bill in equity, provided by the Rev. Sts. c. 38, § 21, is a direct remedy to enforce a legal title, to recover a precise sum of money due, and must allege the same facts as an action of debt, which would at common law have been the appropriate remedy. The St. of 1851, c. 315, does not take away this remedy, but only regulates the alternative remedy of a levy of execution. Even if it is necessary to recover judgment against the corporation before bringing a bill in equity against the stockholders, the liability of the stockholders is not less a debt. *Hurger v. McCullough*, and *Bullard v. Bell*, above cited. *In re Murphy*, 1 Sch. & Lef. 44. Indeed, the St. of 1853, c. 371, § 1, gave an action of contract in such a case.

2. All the insolvents except Dwight, being officers of the corporation, were, upon the facts stated, jointly and severally liable to the plaintiff for the amount of his claim. Rev. Sts. c. 38, § 19.

This liability is a debt, and having been absolutely due and payable before the first publication, is provable in insolvency against their separate estates. The nature of the liability is not affected by the remedy indicated; but if it were, the form of action indicated by the statute, and those sanctioned by the courts for enforcing similar liabilities, show that such liabilities are regarded by the law as debts. Rev. Sts. c. 38, § 29. *St.* 1829, c. 53, § 11. *Salem v. Andover*, 3 Mass. 436. *Bath v. Freeport*, 5 Mass. 325. *Bullard v. Bell*, 1 Mason, 243. *Porter v. Sayward*, 7 Mass. 377. *Whitehead v. Varnum*, 14 Pick. 523. *Simonsen v. Spencer*, 15 Wend. 548. *Pledal v. Hundred de Thisleworth*, Sid. 263. 1 Chit. Pl. (5th ed.) 123. 2 Leigh's N. P. 710. 2 Inst. 650. It is neither qualified, contingent, nor unliquidated; but complete, absolute, and ascertainable as to amount without the intervention of a jury.

3. The policy and intent of the insolvent law are the discharge of the honest debtor, who has surrendered all his property, from all his liabilities, except such as from their nature cannot be determined and ascertained by the machinery proper to a court of insolvency; and the equal distribution of his property among all his creditors. The policy and intent of the statute imposing the liability on which this claim is founded are to provide the creditor of the corporation with an additional security. *Stedman v. Eveleth*, 6 Met. 120. *Bordman v. Osborn*, 23 Pick. 295. To exclude this claim from proof would be to take away that security at the moment when it is most needed, and would contravene the policy, not only of the statute imposing the liability, but also of the insolvent law. It would be inequitable not to allow the creditor to prove his claim under that insolvent law, the provisions of which have dissolved the attachment by which his claim was secured and would have been satisfied. Whenever two or more persons are liable for the same debt otherwise than as partners, the creditor may prove against the estates of each. *Weston, appellant*, 12 Met. 1.

Bangs v. Lincoln & another.

The remedy given by the Rev. Sts. c. 38, § 33, to any officer who shall pay any debt of the corporation will pass to his assignee in insolvency by the assignment. *St. of 1838, c. 163, § 5 A. H. Fiske & E. R. Hoar*, for the defendants.

BIGBLOW, J. The claim of the plaintiff, which he seeks to prove against the separate estates of the insolvents in the hands of the defendants as assignees, is a debt due from a manufacturing corporation of which all the insolvents were stockholders and most of them officers. To entitle him to make such proof, it is necessary that he should make it appear that it was a debt due and payable from each of them at the time of the first publication of the notice of the issuing of the warrant against their separate estates; or a debt then absolutely due, although not payable till afterwards. If it cannot be brought within either branch of this description of debts, then it is clear that it cannot be included within the enumeration of other claims which are provable against the estates of insolvent debtors; and that it must fall within the provisions of *St. 1838, c. 163, § 3*, which excludes all other claims not therein specified from proof.

The case therefore raises the question, whether the liability to which the officers and members of manufacturing corporations are in certain cases made subject by the Rev. Sts. c. 38, in connection with *St. 1851, c. 315*, can in any just or proper sense be deemed the separate debt of each officer or stockholder.

Looking first at the provisions of these statutes, so far as they are applicable to stockholders, it is very clear that the liability which they create does not make the debts of the corporation the direct, separate and private debts of each stockholder. It is true that the liability is declared in very broad and general terms. The provision is that "the members shall be jointly and severally liable for all debts and contracts made by such company." But how liable? Not to an action in favor of the creditor against each or all of them as upon a debt for which they are jointly and severally liable. Such an action could not be maintained. *Knowlton v. Ackley*, 8 Cush. 97. To ascertain the nature of the liability, it is necessary to look at the means by which it can be enforced. These will indicate the

nature of the right which it was the intention of the legislature to create. By proceedings at law under *St.* 1851, *c.* 315, § 3, a stockholder can be held liable only after judgment and execution for the debt have been obtained against the corporation, and a demand has been made on them for the payment of the debt, which has been refused, and a failure to find the property of an officer of the company wherewith to satisfy the execution. *Thayer v. Union Tool Co.* 4 Gray, 75. *Denny v. Richardson*, 4 Gray, 274. Under these provisions it cannot be contended that the liability is direct, positive and absolute, as for a debt due from the stockholder. It is only limited, collateral, and contingent on the failure of the corporation and officers to pay it. How then can it be held to be a debt due from the insolvents, in the sense of the insolvent law? Taking the provisions of the *Rev. Sts. c.* 38, providing for the liability of individual stockholders for the debts of the corporation, in connection with those of *St.* 1851, *c.* 315, they are in substance very similar to those of *St.* 1808, *c.* 65, § 6, which was never held to have made the corporate debts to be due directly from the stockholders, but only to have created a special and limited liability. The case of *Kelton v. Phillips*, 3 Met. 61, in which it was held that a liability under that statute could not be proved as a debt against the estate of a stockholder in insolvency would seem to be quite decisive of the present case.

But it is urged very strenuously in behalf of the plaintiff, that although the remedy at law against the stockholder may be such as to show that his liability is indirect and contingent, yet by the *Rev. Sts. c.* 38, § 31, a direct remedy by a bill in equity is given for the enforcement of such a claim, and that under this provision the liability may be properly regarded as constituting an absolute debt of the stockholder. There are two sufficient answers to this suggestion. It is a misconstruction of this section, to assert that it gives a direct remedy against the stockholder as on a debt or charge for which he is personally liable. No bill can be maintained under it against the stockholder until after a judgment has been obtained against the corporation for the debt. The remedy by bill in equity under § 31 is given

instead of that provided by the preceding section, that is, in lieu of a right to levy an execution, issued on a judgment rendered against the company, on the person or property of the individual stockholder. But it is not given in the place of the judgment against the corporation. As such judgment must be obtained before the creditor could have any remedy by means of a levy of execution on the person or property of the stockholder, so also he must obtain it before he can maintain his bill under § 31, which is only a substitute for such levy.* But the better and more decisive answer is, that the statute of 1851, already cited, essentially modifies the right of the creditor to maintain a bill in equity under Rev. Sts. c. 38, § 31. Equity must follow the law. The effect of the provisions of St. 1851, c. 315, is not merely to alter the remedy of a creditor against a stockholder, or the mode of enforcing the debt, but also essentially to change the nature and character of the liability. If it could have been held to be direct and absolute under the provisions of Rev. Sta. c. 38, it is clearly not so under the subsequent enactment. The alteration in the remedy involved a material modification in the right; or, in better phrase, the legislature adapted the remedy to enforce a right which was contingent and not absolute. It would be unreasonable, if not absurd, to suppose that the intention of the statute was that a stockholder should be more directly and absolutely liable for corporate debts in one mode of proceeding than in another; that a more rigid rule should be administered for the enforcement of such debts in equity than at law. We certainly should not adopt any such conclusion unless it was the unavoidable result of the interpretation of the language of the statute. But no such construction is necessary. The different provisions of the statutes are susceptible of a much more reasonable interpretation. Being *in pari materia*, the enactments are to be construed together as parts of one and the same legislative act. In this view it is clear that the right or liability is the same, whether it is sought to be enforced in law or in equity.

* See *Cambridge Water Works v. Somerville Dyeing & Bleaching Co.* 4 Allen, 239.

The *St.* of 1851, c. 315, so far as it affects stockholders, is a repeal of and substitute for *Rev. Sts. c. 38, § 30*, which prescribed the remedy at law in favor of creditors against stockholders. The provision in § 31 is therefore to be read and construed in the same manner as if it was preceded by the provisions contained in *St. 1851, c. 315*. In this view, the remedy in equity against a stockholder is in lieu of that which is given by proceedings at law, that is, he may be held liable on a bill in equity after the creditor has failed to satisfy his judgment against the corporation by levying his execution upon the corporate property or upon that of the officers of the corporation. This interpretation is consistent with true canons of exposition, and harmonizes the different provisions of the statute. The result is that, both at law and in equity, the liability is only a qualified and limited one, and in no just sense a debt for which the stockholder is absolutely liable.

This conclusion, to which the construction of the statutes leads, is fortified by some considerations of a general nature. The proof of the debts of a corporation, for which stockholders are liable, against their separate estate in insolvency, as debts for which they were absolutely liable, would produce great confusion and embarrassment in the administration of the insolvent law, and be in some respects inconsistent with its manifest scope and purpose. The right of proof could not be confined to debts due from insolvent corporations. It would extend to all debts of every corporation, for which the insolvent might be liable under the statute, whether payable or not, whatever might be their amount, and without regard to the ultimate solvency of the corporation and their ability to pay their debts when they should fall due. If the proof were allowed, the assignees, in behalf of the estate, would have a remedy over against the corporation for the amount paid by them as a dividend thereon, or, if the corporation were unable to pay, then for contribution against the other stockholders. This might render it necessary to keep the insolvent estate open and unsettled for many years. No provision is made for set-off of debts due from the corporation to the insolvent, nor for marshalling assets in order to meet this class of

Bangs v. Lincoln & another.

debts. Creditors of the corporation could prove their debts against the estate, vote in the choice of assignees, decide the question of the right of the debtor to his discharge, and in effect control the whole proceedings, to the practical exclusion of those who were his immediate creditors. The debtor is required to make out and deliver to the messenger a schedule of his creditors and of their place of residence, with the sum due to each, as well as of the nature of the debt and the consideration thereof, and whether it is secured by mortgage, pledge or otherwise. How can that provision be complied with, if the debts of a corporation, for which the insolvent may be liable, are to be regarded as his debts provable against his estate? A stockholder cannot defend against a debt due from the corporation on the ground that it is not due, or that it has been paid, or that for other reasons no recovery should be had against the corporation. *Holyoke Bank v. Goodman Paper Manuf. Co.* 9 Cush. 576. Can the assignee, who represents the stockholders, resist the proof of such claim, and contest the debt in proceedings in the nature of a suit at law on an appeal? These and similar considerations seem to show that the liability of stockholders for the corporate debts was not intended to be included among the class of debts which could be proved in insolvency against the estate of an insolvent stockholder.

It is urged as one ground for allowing such claims to be proved, that, if they are excluded, an insolvent debtor may be left liable to a large amount of debts from which he cannot be discharged. No doubt this is true. But there are many claims from which no discharge can be obtained under proceedings in insolvency, such as contingent debts, executory covenants, guaranties and the like. Those debts only are discharged, which are provable against the estate. Whether they are provable cannot be determined by the inconveniences or hardships which may enure to a debtor by reason of his inability to procure a discharge from them.

Many of the considerations which have been suggested are applicable to the claim of the plaintiff to prove against the estates of the officers of the corporation. But this part of the

Montague v. Hayes & others.

case can be disposed of very briefly. If the right to make such proof is put on the provision of Rev. Sts. c. 38, §§ 19, 29, it cannot be supported, because the liability thereby created is not a debt, but a right of action in behalf of a creditor for neglect or omission to perform certain official duties. If it is put on the provision of St. 1851, c. 315, then it is a secondary liability only, by which the property of the officers is made subject to seizure on execution, if the judgment against the corporation is not first satisfied out of the corporate estate. *Decree affirmed.*

GEORGE L. MONTAGUE vs. FRANCIS B. HAYES & others.

L. and M. purchased real estate, and had it conveyed to L., who furnished the purchase money; and L. wrote to an attorney the following letter: "The agreement between M. and myself is simply this: We have purchased an estate" (describing it) "which has by mutual consent been conveyed to me, I having paid and secured the purchase money. Whatever disposition is made of the property, the profit and loss are to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect." L. afterwards, with M.'s assent, divided the estate into lots, and sold them, and died insolvent. *Held*, that the letter of L., having been acted on by the parties, was evidence of a trust or a partnership, and sufficient to satisfy the statute of frauds; that the lots sold vested in the purchasers discharged of any trust; but that any mortgages taken back by L. upon sales were part of the trust fund.

BILL IN EQUITY, filed on the 8th of July 1851, against Thomas J. Lobdell and William H. Montague, and after Lobdell's death continued by bill of revivor against his representatives. Hearing before *Bigelow, J.*, who reserved for the consideration of the full court the following case:

In July 1844 William H. Montague, (whose rights the plaintiff afterwards acquired,) agreed with Thomas Motley, Jr. and wife, and Francis C. Head, to purchase from them an estate on Washington Street in Boston, for the sum of \$12,000; but, not having funds enough for that purpose, applied to Lobdell to join with him in the purchase, and they two purchased the estate and had it conveyed to Lobdell in fee, and Lobdell paid \$3000 therefor, and gave his promissory notes secured by

Montague v. Hayes & others.

mortgage of the premises for the remaining \$9000. At the time of the purchase, it was agreed between said Montague and Lobdell, that, whatever disposition should be made of the estate, the profit and loss should be divided between them, deducting interest, and that Sidney Bartlett, Esq., should make such papers as might be necessary to carry this agreement into effect; and Lobdell accordingly signed and addressed to Mr. Bartlett the following letter: "August 5th 1844. The agreement between Mr. Montague and myself is simply this: We have purchased an estate of F. C. Head and T. Motley, Jr., on Washington Street, which has by mutual consent been conveyed to me (I having paid and secured the purchase money); whatever disposition is made of the property, the profit and loss is to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect."

Lobdell afterwards, with the consent of the plaintiff, expended large sums of money upon the estate, and sold it in separate lots, taking in some instances mortgages to secure the purchase money, on some of which he received large sums of money for which he never accounted to the plaintiff, and under which he afterwards entered and foreclosed and continued in possession until his death. His estate was represented insolvent, and his administrators, heirs and devisees appeared and answered in this suit.

B. F. Brooks & J. D. Ball, for the plaintiff, cited, to the point that a contract of partnership existed between the plaintiff and Lobdell, which equity would enforce, *Collyer on Part.* §§ 16, 17, 55, 160, 173; *Full River Whaling Co. v. Borden*, 10 Cush. 458; *Reid v. Hollinshead*, 4 B. & C. 878; *Forster v. Hale*, 3 Ves. 696, and 5 Ves. 308; *Dob v. Halsey*, 16 Johns. 34; *Bunnel v. Taintor*, 4 Conn. 568; to the point that Lobdell's letter to Bartlett satisfied the statute of frauds, *Rev. Sts. c. 59, § 30; Barrell v. Joy*, 16 Mass. 221; *Fowle v. Freeman*, 9 Ves. 351; *Lewin on Trusts, c. 4, § 2*; to the point that the plaintiff's claim was not a mere debt, but that he had a right to a specific portion of the property, and, if it had been sold, to the proceeds;

Mon'ague v. Hayes & others.

Story on Part. §§ 407, 408; 3 Kent Com. (6th ed.) 65; Collyer on Part. §§ 125, 127; *Dyer v. Clark*, 5 Met. 562; *Howard v. Priest*, 5 Met. 582; *Parker v. Muggridge*, 2 Story R. 334; Cross on Liens, 193; and that Lobdell's creditors could take no greater interest than he could, *Dyer v. Clark*, 5 Met. 562; *Root v. Blake*, 14 Pick. 273.

S. Bartlett & C. F. Choate, for Lobdell's administrators, cited to the point that there was a partnership in the profits or profits and loss only, and not in the capital, *Meyer v. Sharpe*, 5 Taunt. 74; *Ex parte Hamper*, 17 Ves. 404; *Smith v. Watson*, 2 B. & C. 401; Story on Part. § 27; *Pitts v. Waugh*, 4 Mass. 224; *Forster v. Hale*, 5 Ves. 314; that Lobdell's letter did not contain the entire contract, and equity would not execute it; *Smith v. Burnham*, 3 Sumner, 435; *Abiel v. Radcliffe*, 13 Johns. 297; *Dwight v. Pomeroy*, 17 Mass. 303; *Brooks v. Wheelock*, 11 Pick. 439; that creditors have rights to property as against a dormant partner, *Lord v. Baldwin*, 6 Pick. 348; *French v. Chase*, 6 Greenl. 166; *Cammack v. Johnson*, 1 Green Ch. 163; that under our statute neither an express trust, nor the implied trust which the law raises in case of partnership, can defeat creditors or *bona fide* purchasers without notice, Rev. Sts. c. 59, §§ 30-32, and commissioners' note; and that in an insolvent estate, the administrators represent the creditors, *Holland v. Cruft*, 20 Pick. 321.

G. Bancroft, for the heirs and devisees.

BY THE COURT. The letter to Mr. Bartlett was a valid offer; and being accepted and acted upon by the parties, it constituted a contract by which either a trust or a partnership was created. And whether a trust or a partnership, Lobdell became accountable for the proceeds of the sales, and this liability devolved upon his administrators.

If the property has been alienated, it having been done in pursuance of the arrangements between the parties, the title was vested in the purchasers, discharged of the trust; and therefore, if all the property has been alienated, no specific performance in the way of a transfer of real estate can be decreed.

If the property bought and held under the agreement has been sold, and mortgages taken back by Lobdell to secure the

Montague v. Hayes & others.

whole or part of the purchase money, such mortgages constitute a part of the trust or partnership fund, and must be deemed a part of the trust property in which the plaintiff has a right and interest, the extent of which is to be determined by taking an account.

The case must be referred to a master to state an account. Lobdell's estate is to be allowed interest on the half of the purchase money advanced by him for William H. Montague, and is to be allowed for all other moneys advanced and for expenses.

Whether the plaintiff can have a preference over other creditors depends on the question whether the specific trust property or mortgages taken to secure the purchase money on sales thereof remain, or whether the balance, if any, due the plaintiff results only in a sum which is a debt due from Lobdell's estate. This question will properly arise when the master reports; all other questions to be reserved till the coming in of the report.

Ordered accordingly.

SUPPLEMENT.

Under the twenty-first article of amendment of the Constitution, the mayor and aldermen of Boston in the county of Suffolk and the county commissioners in other counties are empowered to apportion the number of representatives assigned to the county among the representative districts formed by them, under said article, as well as to form the districts; and their doings and returns in the premises are conclusive, and cannot be revised by the house of representatives in judging of the returns of elections and qualifications of its members.

THE undersigned, justices of the supreme judicial court, have received a communication from the honorable the house of representatives, requesting their opinion upon the following questions, to wit :

“ First. Does the twenty-first article of amendment of the Constitution confer on the commissioners named in that article, or, in the county of Suffolk, on the mayor and aldermen of the city of Boston, any power to apportion the number of representatives to which the county is entitled, among the representative districts formed by them pursuant to that article ? Or, in other words, does the power of the said commissioners, or mayor and aldermen, extend to the assignment of the number of representatives to which the districts formed by them are entitled, as well as to the formation of such districts ?

“ Second. When the said commissioners or mayor and aldermen have divided the county into representative districts, and apportioned the representatives to which the county is entitled among such districts, is it competent for the house of representatives, in judging of the returns of elections and qualifications of its own members, to revise their said proceedings in whole or in part, and to change the number of representatives so apportioned to any district or districts, if satisfied that such number is different from the number to which such district or districts would be entitled, if determined exclusively by the enumeration

of legal voters, taken pursuant to said twenty-first article of amendment?"

Whereupon the undersigned, having taken the said questions into consideration, do thereupon ask leave respectfully to submit the following opinion.

Upon the first question we are of opinion, that the twenty-first article of amendment of the Constitution, which took effect and went into operation in 1857, did confer full power on the commissioners named in that article, in all the counties except Suffolk, and in the county of Suffolk on the mayor and aldermen of the city of Boston, to apportion the number of representatives to which such county might, by the act of legislation therein provided for, be entitled to, among the representative districts to be formed by them pursuant to said article; and that the power of the said commissioners in the several counties, and of said mayor and aldermen in Suffolk, did extend to the assignment of the number of representatives to which each of the districts to be formed by them would be entitled, as well as to the formation of such districts.

We are of opinion, founded on all the terms and provisions of the twenty-first article of amendment, as well as on the objects and purposes proposed to be accomplished by this change in an important part of the Constitution, that it was intended to vest in the county commissioners for the several counties, and in the mayor and aldermen of the city of Boston — unless special commissioners should first be elected for that purpose, in the manner directed by that article for the exercise of the same power, which was not done — not only to form the several towns in each county, and wards of each city in their respective counties, into local districts, to be designated by metes and bounds, and further designated by a specific enumeration, not dividing any town or any ward of a city, and make return thereof; and therein to specify and declare the number of representatives, which each of said districts shall have a right to send to the general court, to constitute the house of representatives; the number thus assigned to each district, and thus declared and returned, not to be less than one nor more than three in each district. And we may add that, in our own opinion, these

boards of commissioners — no special commissioners having been elected for the purpose — would not have fully executed the power confided to them by this constitutional provision, nor fully have performed the duty required of them, if they had not thus assigned, designated and specified, and declared in their returns, the number of representatives to which each district should be entitled, until the time for a new formation of a district and apportionment of representatives.

Perhaps it may not be easy, in a short space, to state all the reasons on which this opinion is placed; but we will mention some of the most prominent.

This amendment contemplated and provided for carrying into effect one of the most important changes which could be made in the Constitution of the Commonwealth. Nothing can more deeply concern the freedom, stability, the harmony and success of a representative republican government, nothing more directly affect the political and civil rights of all its members and subjects, than the manner in which the popular branch of its legislative department is constituted. We do not here speak of it in its character as a true representative of the interests, the intelligence and the will of the whole, and all the parts of the constituent body, but as a practical scheme of measures for the accomplishment of a great object. It obviously required a system of plain, simple and intelligible rules, easy to be understood, and to be carried practically into execution by hundreds and thousands of town and city officers of all degrees of intelligence. And this system was designed to supersede and replace the long practice of electing representatives through the medium of town organizations, and the agency of municipal officers, a practice which had grown so familiar from experience and habit, that it was almost impossible that any mistake could be made. These considerations, it appears to us, must have been deeply impressed on the minds of the legislatures and people of the Commonwealth, in proposing and adopting this amendment, and must therefore be kept steadily in view in putting a construction upon it, both in its general scope and in all its details.

The great object to be attained manifestly was to reduce

greatly the number of representatives, and, in conformity with the theory of representation, to secure as nearly as possible an equality in the ratio of representatives and legal voters throughout the Commonwealth. This object might be accomplished in any one of various modes. The amendment itself might have divided the State into districts, and have apportioned the representatives among them; or it might have authorized the legislature to do the same thing; or it might authorize the legislature to do it in part, and provide that the details should be completed by another body specially designated and empowered for that purpose. This was the expedient actually adopted. A census of the number of legal voters in each city and town being first made, as provided for in the amendment, the legislature were required to apportion the two hundred and forty representatives among the several counties of the State. Then, unless a law should be passed providing for the election of a board of special commissioners in each county — and no such law was passed, and no such special commissioners were elected — the mayor and aldermen of the city of Boston, the county commissioners of other counties than Suffolk, should on the first Tuesday of August after each assignment of representatives to each county, assemble at the shire town of their respective counties, and proceed as soon as may be to divide the same into representative districts of contiguous territory, so as to apportion the representation assigned to each county equally, as nearly as may be, according to the number of legal voters in the several districts of each county.

Such was the system provided. The legislature, had they seen fit, might have postponed making the apportionment among the counties, and in the mean time have provided by law for the election of special commissioners, which would have extended as well to Suffolk as to the other counties; had they done so, the powers of such special commissioners would have been precisely the same in all the counties. The legislature passed no such law; on the contrary, they made the apportionment among the counties, which, by the amendment, the secretary of the Commonwealth was required forthwith to certify to the board authorized to divide each county into repre

sentative districts. It became therefore the duty of the mayor and aldermen of Boston to proceed and perform the same duties for the county of Suffolk, which special commissioners would have been authorized and required to do, had they been elected as provided in this amendment.

These boards are to divide the respective counties into representative districts, so as to apportion, as nearly as may be, according to their relative number of legal voters; but this is to be done under several absolute and inflexible conditions, prescribed by the Constitution, by which they are bound.

1. No town, and no ward of any city, can be divided in forming a district.

2. No town or ward of a city can be united with any other town or ward of a city to form a district, unless they are contiguous to each other.

3. No district can be formed, embracing so large a number of voters as, according to the ratio for such county, would enable it to send more than three representatives.

Subject to these conditions, having a regard to the relative number of voters in each town, and city ward, so far as it can be had, consistently with these fixed conditions, they are to form representative districts with such number of voters as to enable them to chose one, two or three representatives. To illustrate this: They must first ascertain the ratio between the voters and the representatives, by taking the whole number of voters in the county, and dividing that number by the number of representatives assigned to it. This must, almost of necessity, certainly according to the doctrine of chances, leave a fraction for which it may in some cases be necessary to provide. Having established the ratio for one, it is for the board to form districts having within them numbers, as near as may be in reference to other conditions, to the ratio thus found, to choose one representative, or twice that number to choose two, or three times that number to choose three. This is clearly within their express authority. They are bound to have this consideration in their own mind, in forming, describing and numbering each district, whether it is a district for one, two or three; this they are bound to do by the regard they are bound to have to

equality in the ratio between voters and representatives. They are bound to form the district with a view to the number of the representatives to which such district shall be entitled, whether they are bound to express it in their return or not.

In many counties there may be a great variety of circumstances calling for the exercise of judgment in the formation of districts. The county of Middlesex has, we believe, fifty two towns and cities, forty nine towns and three cities. Suppose each city has six wards, here are sixty seven organized bodies, with some very large towns and some very small ones, to be classed and grouped together into districts, so as, in the whole, to elect thirty eight representatives. We will not undertake to imagine the great variety of complex circumstances under which, according to the Constitution, this duty is to be done. Without putting particular cases by way of illustration, which might be greatly extended, it seems that equality between voters and representatives cannot be reached, and, indeed, was not contemplated by the amendment, except that "as nearly as may be" approximation to this equality is to be sought by those whose duty it is to form the districts. In forming districts with a view to such approximation, they must take into consideration,

1st. The absolute number of voters in each town and city ward of the county, as fixed by the census for the occasion.

2d. Whether that number is over or under the ratio of voters to a representative for that county, as first found, and how nearly it approaches that ratio for one, or double that number for two, or treble that ratio for three representatives.

3d. Whether any one town, or city ward, with reference to that ratio, can be constituted one district approximating nearly, and how nearly, to the ratio for sending one or more; or whether any such town or city ward can be so combined with any other one or more towns or city wards, so that the aggregate of voters in the towns or wards so combined shall approach nearly, and how nearly, to such ratio, or its duplicate or triplicate.

Thus it will be perceived that the great principle of equality of representation, or the nearest practicable approximation to it, which lies at the foundation of this whole constitutional pro-

vision, is to govern, subject to the inflexible restrictions not only in apportioning the representatives to the district, but in the mode of forming the districts, so as to bring that approximation as near as may be to the true equality. They had full authority to form these districts, with reference to the election of one, two or three representatives, and were bound to be governed by the great principle of equality in doing it, conformably to the tenor of the constitutional amendment under which they acted. Here then there was abundant room for the exercise of reason and judgment in forming the districts; they must have formed them with the view to their right to elect one, two or three representatives, and it would seem to be necessarily incident to the completion of the work, that they should declare and return the number intended that each district should be entitled to elect.

Thus far we have drawn our illustrations respecting the powers of the commissioners, and mayor and aldermen, from the cases which may be supposed to arise in other counties than Suffolk. The circumstances indeed, on which the commissioners were to act, might be considerably different, inasmuch as the city at no distant period had been divided into twelve wards, then nearly equal, for the purposes of representation in the city council. There would therefore be likely to be fewer cases of complex and extraordinary facts, calling for the exercise of judgment, though there had come to be large discrepancies between the numbers of inhabitants, and still greater of legal voters, in the respective wards. But the same powers are given in the same terms to the mayor and aldermen in Suffolk and the commissioners in other counties, and no purpose is shown in the amendment, to invest them with other or different powers.

Again; this constitutional amendment not only vested in the mayor and aldermen the power to form districts in the county of Suffolk after the census and apportionment of 1857, but also after that to be made in 1865, and every tenth year after, to all future time. There may or may not be a new arrangement of the city into wards, by increasing or diminishing the number of wards, or by an entirely new division. If no such new arrangement of wards is made before 1865, or the next or some succeeding decennial term, judging from experience, there will

probably be a much greater disparity in the number of legal voters than at present. Some one or more will perhaps have so increased, that when the ratio for the county is established, they may be found to have over four times that number; but by the inflexible rule it can have but three representatives. Some one may have so far decreased as to fall short of the ratio for one. But by the same inflexible rule, it cannot be disfranchised. It may not be contiguous to any other ward, with which it may be united, without making the aggregate number of voters more than enough by the ratio for three; it must therefore, however small, be constituted a district to choose one.

Here then would be room and a great demand for the exercise of reason and judgment in determining, among various methods placed within their reach, how the district should be formed, and a determination, somewhat judicial in its character, how many representatives each district is entitled to elect.

But at the time of the adoption of this amendment, it could not be known that such questions would not arise in Suffolk as well as in other counties; and the power was given to the commissioners of all counties alike, to meet all cases to which it could extend at the first or subsequent establishment of districts.

The makers of this constitutional amendment, not having formed the State into districts for the election of representatives, not having vested the power in the legislature to form the counties into districts, but only to apportion the two hundred and forty representatives among the counties, must have felt the necessity of providing a body, competent in their view to perform this duty fully and completely. They must have understood that, in the performance of this duty, the questions herein before suggested, and many others not capable of being solved by mere computation, must arise, and must be determined by sound judgment. The question then recurs, looking at the exact terms of the amendment and its obvious purposes, to what body was this duty entrusted, and what powers were vested in them to enable them to perform it?

We can have no doubt, that this whole duty was confided to the county commissioners for other counties, and to the mayor and aldermen of Boston for the county of Suffolk, there being

no county commissioners in this county. The terms, though not clear and explicit, do in our opinion import this. They are to divide their respective counties into representative districts, so as to apportion the representation equally, as near as may be, according to the number of voters in each district. There is a slight obscurity in the sentence, which would be removed by a slight change in the words. If there were a comma after "voters," and the word "in" were "to," it would be somewhat more free from obscurity. But we think the meaning is, "so as to apportion," or "so that they may apportion" "in" or "to" the districts. But this is confirmed by the residue of the provision prescribing the duty of the commissioners.

The districts in each county shall be numbered by the board, and a description of each, so numbered, with the number of legal voters in such county, shall be returned by the board to the secretary of the Commonwealth, the county treasurer of each county, and the clerk of every town in each district, to be filed and kept in their respective offices.

Here, then, is the purpose for which these returns are to be made: not for revision or correction, not for acceptance or rejection, or recommitment, but for preservation and information; a final act, determining the rights of all parties concerned, and in effect standing as part of the Constitution during the decennial period.

Again; it is not expressly required by the provision, that the board shall state the whole number of the representatives which they are required to apportion to the whole county; whereas by returning the number apportioned to each district, the aggregate of the numbers of representatives assigned to each district will show that they have rightly apportioned the whole number assigned to the county; and this leads to a strong conclusion, that such an apportionment to each district was to be made and returned by the commissioners.

But even should the commissioners return the whole number of representatives apportioned to the county, and that they had formed it into a given number of districts, stating the number of legal voters in each, without specifying the number of representatives to each district, the work would be very imperfect.

For instance, in Suffolk there are two cities, Boston and Chelsea, and two towns, North Chelsea and Winthrop. Whether Chelsea is divided into wards or not, we do not know; probably it is. Suppose the mayor and aldermen had returned that they had apportioned twenty eight, the number of representatives assigned to the county by the legislature, and had formed it into thirteen districts, giving the number of voters in each, without more; it would be extremely difficult, if not impossible, to determine by mere calculation, what number each would be entitled to choose, on account of the fractions, larger or smaller, by which some districts would fall short, and some exceed the average ratio. But if it were possible to ascertain the number of representatives which each district would be entitled to elect, it must be through the medium of a complex and difficult calculation, to be made by the officers and voters at every election; whereas the article plainly requires a simple, recorded document, open to the inspection of all, stating in terms the number which each district may elect, for the government of all city, town and ward officers, in issuing warrants, calling and holding meetings, and for receiving and certifying votes, and also for the information and security of voters.

The question then recurs whether the doings and returns made conformably to the article of amendment are to be deemed conclusive?

This is a question of power. The power, whatever was its extent, was conferred when the amendment was adopted; it was conferred alike on the commissioners and on the mayor and aldermen in their respective counties; it was not limited to the state of things as it then existed, but was intended to adapt itself to all such changes and states of things as might arise at any future time. As the exigency of the case, namely, the regular and harmonious action of the government, required that the powers of those bodies, appointed in behalf of the people to establish representative districts, should be large and adequate to the occasion, to enable them to decide all questions incident to the establishment of such districts, within the limits prescribed by the article itself; as such exigency required that the execution of these powers should be definitive, (and no

mode is suggested for the revision of the doings of the commissioners;) the conclusion is that the decisions of the various questions before them, made by the bodies thus empowered, as expressed in their final action and returns, must be taken to be decisions made by a body of competent jurisdiction, duly authorized by the Constitution, and are therefore conclusive.

In answer to the second question, the undersigned are of opinion that it would not be competent for the house of representatives, in the case supposed, in judging of the returns, elections and qualifications of its own members, to revise the proceedings of the county commissioners and mayor and aldermen, in whole or in part, and to change the number of representatives, by them apportioned to any district, if satisfied that such number is different from the number to which such district would be entitled, if determined exclusively by the enumeration of legal voters, taken pursuant to said twenty-first article of amendment.

The house of representatives are, by the Constitution, final judges of the returns, elections and qualifications of their own members. Their duty is, we think, rather to judge of the rights of persons returned as members, and claiming to be members, than of the rights of districts or constituencies, although the latter may sometimes be incidentally involved. For instance, in the case suggested by the question, suppose three members are returned by a district to which three were assigned, and suppose another, to which two only were assigned, claiming a right to send three, had elected and returned three; the whole six could not hold seats, and the house must decide between them. But in coming to that decision, they must, in our opinion, look exclusively to the act done by the commissioners pursuant to the Constitution, by which the districts were formed, and the number of representatives assigned to each. Were it otherwise, it appears to us that great confusion would follow. If the house could decide between two particular districts, coming before them by petition or otherwise, each claiming a superior right to the other, then any and all the other thirteen or fourteen districts in Suffolk might come before the house in the same manner, to have their rights determined. So of the coun'y of

Middlesex, with its forty nine towns and three cities to choose thirty eight representatives ; it may be divided into any number of districts not less than thirteen nor more than thirty eight. Should any error be discovered in combining contiguous towns and city wards into districts, or in the computation of the numbers of voters, necessary to the apportionment of representatives among them, the whole might be revised, and many changes of representatives made, and yet such act of the house could only extend to the elections for one year.

No ; it is obvious that if the Constitution had itself framed the districts, and apportioned the representatives, it must be taken by the house to be conclusive, although errors of computation might afterwards be discovered in the application of the principle of distribution adopted by its framers. Now, when a part of this duty was ordered to be done and returned by other public bodies, and recorded in various public offices, for the general and authoritative information of all officers and voters, it was an act done by the delegated authority of the Constitution, and ought to have the same practical effect as if done in terms by the framers of it.

For the reasons given in answer to the first question, therefore, we are of opinion that the house of representatives, in exercising the right vested in them by the Constitution respecting the election of members, are bound to take the formation of districts, and the apportionment of representatives to each district, as made and returned by the county commissioners and the mayor and aldermen of Boston in their respective counties, to be conclusive.

If it shall be asked what shall be done if one of these apportionments and returns shall be discovered to be erroneous, one answer is that the Constitution has provided no power competent to inquire into and correct any such error. Some error may occur in all human transactions, and therefore even those who may discover or think they have discovered an error, may themselves have fallen into error in conducting their inquiries and making their computations. But the final power must rest somewhere, and the exigencies of government will not admit of its waiting in its movements until all possible errors in its constitution and organization are removed.

All public officers who are charged with the performance of public duties, and who may be guilty of fraudulent, wilful and corrupt conduct in the discharge of them, are liable to prosecution and punishment therefor, by impeachment or indictment; but even punishment for their misdeeds may not necessarily correct them, though it may afford an additional security to the public against their perpetration.

LEMUEL SHAW,
CHARLES A. DEWEY,
THERON METCALF,
GEORGE T. BIGELOW,
BENJ. F. THOMAS,
PLINY MERRICK.

Boston, March 11th 1858.

VOL. X

INDEX.

ABANDONMENT.

See INSURANCE, 21-24.

ABATEMENT.

See PLEADING, 2.

ACCOMPLICE.

See EVIDENCE, 1; WITNESS, 2.

ACCOUNT.

See EQUITY, 3; EVIDENCE 4, 5.

ACTION.

An action of tort for taking and carrying away and converting to the defendant's use goods of the plaintiff cannot be maintained without proof of the plaintiff's possession, or right to an immediate possession. *Winship v. Neale*, 382.

See ARBITRAMENT AND AWARD; CORPORATION, 2; EQUITY, 2; INSURANCE COMPANY; JUDGMENT; LOAN FUND ASSOCIATION, 2; MANUFACTURING CORPORATION, 4; MASTER AND SERVANT, 3, 4; PARTNERSHIP; PLEADING, 3; PRINCIPAL AND AGENT, 1; SPIRITUOUS AND INTOXICATING LIQUORS, 5.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMISSIONS.

See EVIDENCE, 20-23, 25.

ADVANCEMENT.

An intestate kept and left at his death a little book, "showing," as was stated in a memorandum at its beginning, signed by him, "the moneys I have advanced to my children severally, and to which I shall give credit to any or each of them as they may pay me from time to time." The book was in the form of accounts with each child, one of which showed that a son "had had" a certain

sum; and, on the opposite page, these words: "Went into chancery, but paid nothing." He did prove against that son's estate in insolvency the sum thus charged in the book, and interest, and assented to his discharge. *Held*, that this sum was not an advancement, under the Rev. Sta. c. 61, § 9. *Bigelow v Poole*, 104.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

See VERDICT.

ANSWER.

See PLEADING, III.

APPEAL.

The submission of a case in writing to the judgment of the superior court or court of common pleas upon evidence, "to be tried without the intervention of a jury," is a waiver of a trial by jury, pursuant to St. 1857, c. 267; and from the judgment thereon, if no exceptions are taken, no appeal lies. *Bass v. Haverhill Mutual Fire Ins. Co.* 400.

See POOR DEBTORS, 3; REVIEW, 2.

ARBITRAMENT AND AWARD.

A judgment on an award in favor of the builder against the owner of a house, upon a submission of all demands between them, is no bar to an action against the builder by the owner to recover a sum which he is subsequently, though before paying the amount awarded, obliged to pay to discharge the mechanics' lien of a workman employed by the builder, which has not been included in the award. And the owner may, without previous demand or notice, maintain such action, to recover the amount so paid, including the costs of the proceeding to enforce the mechanics' lien. *Hale v. Huse*, 99.

See EVIDENCE, 12.

ARREST.

A constable who arrests a debtor on execution and commits him to jail, but leaves no copy of the execution with the jailer, who therefore refuses to receive and detain him, cannot arrest him again on the same execution. *Houghton v. Wilson*, 365.

See BAIL, 2; POOR DEBTORS, 3.

ASSAULT AND BATTERY.

See BAIL, 1; INDICTMENT, 4; VERDICT.

ASSESSMENT.

See MUTUAL INSURANCE COMPANY.

ASSESSOR OF DAMAGES.

See INSURANCE, 13.

ASSIGNEE OF INSOLVENT DEBTOR.

See EVIDENCE, 9, 10; INSOLVENT DEBTORS, 1; WRIT.

ASSIGNMENT.

See INSURANCE, 1, 7; LANDLORD AND TENANT, 3.

ATTACHMENT.

A grocer's stock in trade is not exempt from attachment under St. 1855, c. 264.
Reed v. Neale, 242.

See BOND; DAMAGES, 4; SHIPS AND SHIPPING, 1; RAILROAD, 3; TRUSTEE PROCESS, 1.

AUDITOR.

In an action in which an auditor's report had been produced in evidence by the plaintiff, the judge instructed the jury that the burden of proof was upon the plaintiff, and was not satisfied by the auditor's report; that this was *prima facie* evidence, but might be rebutted by the defendant; that, if not rebutted, the verdict should be for the plaintiff; but if on the whole testimony there was a preponderance of evidence in favor of the defendant, the verdict should be for him. *Held*, that the defendant had no ground of exception. *Bradford v. Stevens*, 379.

AWARD.

See ARBITRAMENT AND AWARD.

BAIL.

1. Danger of the death of an assaulted person in consequence of the assault is no ground for refusing bail on a charge of assault and battery only. *Dunlap v. Bartlett*, 282.
2. A defendant arrested on mesne process, and refused the poor debtors' oath, is entitled to give a bail bond under St. 1857, c. 141, § 22. *Wass v. Bartlett*, 490.

BAILMENT.

1. The liability of a person who negligently receives goods not directed to him is the same as that of a bailee for hire or reward. *Newhall v. Paige*, 366.
2. A contingent benefit is a sufficient consideration for undertaking a bailment. *Ib.*
3. A person who has illegally detained goods, which the owner has since agreed

to accept and send for, is not liable for their destruction by fire without his fault, after the owner has had a reasonable time to remove them. *Carnes v. Nichols*, 369.

BANK.

By a fraudulent conspiracy between the paying teller of the Merchants' Bank, the teller of the Atlantic Bank, and a broker, the broker drew a check on the Merchants' Bank, where he had no funds, which the paying teller marked "good," and the broker took it to the teller of the Atlantic Bank, who gave him the money for it in current bills, partly on the Atlantic Bank and partly on other banks. The broker took these to the Merchants' Bank, and gave them to the paying teller, who, for the purpose of covering a deficit, unknown to any of the bank officers, in his cash, which was to be counted that afternoon, placed them with it. The purpose for which the money was obtained was known to the two other parties, but no other officer of either bank knew anything of the transaction. The paying teller's cash was produced by the cashier to the directors, and counted by them that afternoon, approved and returned to him. The next morning he committed suicide, the check was presented at the Merchants' Bank and payment refused. *Held*, that the Merchants' Bank could not hold the money as against the Atlantic Bank, and were liable to the latter, after demand, in an action for money had and received. *BIGELOW and MERRICK, JJ. dissenting. Atlantic Bank v. Merchants' Bank*, 532.

See PROMISSORY NOTE, 7.

BANK BILL.

See FORGERY; INDICTMENT, 2; LARCENY, 2.

BASTARDY PROCESS.

A bond, conditioned that the accused in a bastardy process shall appear and answer to the complaint and abide the final order of the court thereon, is discharged by his attendance at court so long as the action is pending and at the final order, and his subsequent arrest at the instance of the complainant and committal to prison under that order for a failure to give bond to perform it. *Power v. Fenno*, 249.

See EVIDENCE, 11.

BEACH.

See DEED, 2

BOND.

It is no defence to an action on a bond to dissolve an attachment, that within thirty days after judgment in the original action the principal took the benefit of the insolvent laws. *New England Steam & Gas Pipe Co. v. Parker*, 333.

See BAIL, 2; BASTARDY PROCESS; INSOLVENT DEBTORS, 1.

BURDEN OF PROOF.

See AUDITOR; COVENANT; PROMISSORY NOTE, 2-5; WAY, 1.

CARRIER.

See RAILROAD, 1.

CASE STATED.

See APPEAL.

CASES OVERRULED, DOUBTED OR DENIED.

GRAND CANAL v. FITZSIMONS, 1 Hudson & Brooke, 449. *Fuller v. Ruby*, 289
STOKES v. COOPER, 3 Campb. 514, note. *It*

CHARITABLE USES.

See TRUST, 5.

CHARTER PARTY.

See SHIPS AND SHIPPING, 2, 3.

CITY.

See JUDGMENT, 3.

CONFESSIONS.

See EVIDENCE, 2.

CONFLICT OF LAWS.

See INSURANCE, 6.

CONSIDERATION.

See BAILMENT, 2; JUDGMENT, 2; PROMISSORY NOTE, 1.

CONSTITUTIONAL LAW.

See HOUSE OF REPRESENTATIVES; EXCEPTIONS, 2; INDICTMENT, 5
JURY, 2; SPIRITUOUS AND INTOXICATING LIQUORS, 3, 4.

CONTRACT.

A contract to build and set up engines for a corporation was made with them through their agent, who became insolvent before the engines were completed, and the contractor thereupon, supposing the principals to be involved in their agent's insolvency, stopped his work, carried away parts of the engines already set up, and gave notice that he should not complete the engines without further security, and the corporation told him that they did not consider themselves bound by the contract. *Held*, that the contract was discharged, and could not be enforced against the corporation without evidence of a new

agreement by them that the contractor should go on and complete it. *Adams v. Boston Iron Co.* 495.

See DAMAGES, 2; EQUITY, 4; FRAUDS, STATUTE OF; PARTNERSHIP, 2; PROMISSORY NOTE, 1, 10; SHIPS AND SHIPPING, 2, 3.

CORPORATION.

1. A resolve of the executive council of the Commonwealth in 1786, establishing "a company of artillery" in a town, "agreeably to military law," did not make them a corporation. *Shelton v. Banks*, 401.
2. Proving a claim against a corporation in insolvency under St. 1851, c. 327, and receiving a dividend thereon, will not bar a suit against the corporation for the rest of the debt. *Coburn v. Boston Papier Maché Manufacturing Co.* 243.

See EVIDENCE, 23-26; MANUFACTURING CORPORATION; PLEADING, 3; PROMISSORY NOTE, 6; RAILROAD; SERVICE OF WRIT, 2, 3; TRUST, 2; TRUSTEE PROCESS, 1.

COSTS.

Upon the sustaining by this court of exceptions in a criminal case, the costs of papers for the court are to be paid by the Commonwealth. *Commonwealth v. Evans*, 463.

See TENDER, 1.

COUNTERFEITING.

See FORGERY.

COURTS.

See INSOLVENT DEBTORS, 3; JUDGMENT, 1.

COVENANT.

In an action on the covenant against incumbrances, the burden of proof is on the plaintiff to show that any incumbrance was lawful. *Lathrop v. Grosvenor*, 52.

See HUSBAND AND WIFE, 1-3; LANDLORD AND TENANT, 2-4.

CUSTOM.

See MASTER AND SERVANT, 1.

DAMAGES.

1. In an action for not delivering stock according to an order which specifies no time of delivery, the measure of damages is the value of the stock when demanded. *Eastern Railroad v. Benedict*, 212.
2. One who has contracted to build the sea-wall of a wharf, and failed to perform his contract, and, on being requested to rebuild it, promised to do so, and thereby induced the other party to delay rebuilding it himself, is liable for the

- loss of rent of the wharf occasioned by his own negligence. *Willey v. Fredericks*, 357.
3. The measure of damages against a wrongdoer for the conversion of plates for printing labels or advertisements, of great value to the owner, but of very trifling value to others, is the value to him; and in estimating this the cost of replacing the plates may be considered. *Stickney v. Allen*, 352.
 4. In an action for the conversion of chattels to the defendant's use, the measure of damages is not affected by the defendant's having, after the conversion, attached them on mesne process against the plaintiff, and then discontinued that action and offered to restore them to the plaintiff, who refused to receive them. *Ib.*
 5. In an action for attaching property on mesne process against a third person, which remains in the plaintiffs' possession after the attachment and until judgment and execution thereon, the measure of damages is the value of the property at the time of its being taken on the execution. *Henshaw v. Bank of Bellows' Falls*, 568.
 6. In an action of tort for obstructing a right of way, damages for the consequent diminution of rents cannot be recovered unless specially alleged in the declaration. *Adams v. Barry*, 361.

See ESTOPPEL; INSURANCE, 4, 12; JUDGMENT, 4.

DECLARATION.

See PLEADING, II.

DEED.

1. A deed of "a certain parcel of land, situated in A., being my homestead, containing two hundred acres, being the same estate now occupied by me," does not pass four lots in the occupation of tenants at will, although included in two hundred acres in A., owned by the grantor; and cannot be contradicted by extrinsic evidence of an intent of the parties to include those lots. *Warren v. Cogswell*, 76.
2. A conveyed to B a lot of land bounded "south on a passage way twenty feet wide," "also such rights on the beach lying directly between the passage way and the sea, as were" conveyed to the grantor by F, by a deed which passed the beach as appurtenant. B conveyed to C this lot, describing it as "bounded southeasterly on a passage way," and as "entitled to the privilege, mentioned in a deed from F to A, to which reference for further particulars may be had." *Hell*, that the beach passed under both deeds. *Cook v. Farrington*, 70.
3. A deed by a tenant in common of "sixty four rods, being part of" the lot held in common, passes no title in common; nor in severalty, without possession taken under it of the part claimed. *Phillips v. Tudor*, 78.
4. A deed of land, *habendum* "with all the privileges and appurtenances to the same belonging excepting all the wood and trees on a certain island I reserve to the grantee his heirs and assigns forever," and concluding "it is to be understood that the wood above mentioned is reserved to the grantor and his heirs

forever," reserves to the grantor an estate of inheritance in the wood and trees only then growing, with a right in the soil for their growth and nourishment, and the privilege of entering to take them away. *Putnam v. Tuttle*, 48

See EVIDENCE, 6-8; FLATS, 2; WAY, 1.

DEMAND.

See ARBITRAMENT AND AWARD; EMBEZZLEMENT, 4; MORTGAGE, 2, 4; PLEADING, 5.

DEMURRER.

See PLEADING, 7.

DEPOSITION.

In a deposition taken by commission objections to the form of interrogatories must be taken before the commission issues. *Adams v. Wadleigh*, 360.

See EVIDENCE, 14.

DEVISE.

See WILL.

DIRECTORS.

See INSURANCE COMPANY; MANUFACTURING CORPORATION, 3, 4.

DIVORCE.

See HUSBAND AND WIFE, 2, 3.

EASEMENT.

The passage of water from rain and melting snow over the surface of land for twenty years gives no right to its continuance. *Park v. City of Newburyport*, 28.

See EVIDENCE, 19-21; LIGHT AND AIR; WAY.

EMBEZZLEMENT.

1. The treasurer of a railroad corporation is an "officer, agent, clerk or servant of an incorporated company," within the Rev. Sts. c. 126, § 29, relating to embezzlement by such persons. *Commonwealth v. Tuckerman*, 173.
2. If money of a railroad corporation is received by their treasurer, and by him deposited to his credit as such treasurer, and afterwards drawn out by him either in bills or coin, such bills or coin are the property of the corporation, and, while in the hands of the treasurer, subjects of embezzlement by him; and if he afterwards, while still treasurer of the corporation, fraudulently converts such money to his own use, without their consent or knowledge, and without claim of right, it is embezzlement; although the guilty intent does not exist at the moment of drawing the money out of the bank, but is formed afterwards; and although at the time of the fraudulent conversion he intends to restore the amount, and has property sufficient to secure its restoration. *Id*

8. Upon the trial of an indictment for embezzlement, other previous acts of a similar character, enumerated with the one charged in the indictment in a paper drawn up by the defendant as a statement of all sums taken by him, are admissible in evidence to show the intent with which the act charged was committed. *Ib.*
4. It is not necessary, in order to constitute embezzlement, that there should be a demand of the money alleged to have been embezzled, or a denial of its receipt, or any false account given of it, or false statement or entry concerning it, or refusal to account for it. *Ib.*

See EVIDENCE, 2.

EQUITY.

1. This court has no jurisdiction in equity to enforce a trust arising under the will of a foreigner, which has been proved and allowed in a foreign country only, and no certified copy of which has been filed in the probate court here *Campbell v. Wallace*, 162.
2. If a trustee having power to sell, but not to mortgage, mortgages the trust estate, the remedy of any one claiming, either in his own right or as trustee, under the *cestui que trust* is at law and not in equity. *Peabody v. Harvard College*, 283.
3. Before the *St.* of 1854, c. 74, a bill in equity could not be maintained by one tenant in common against another for a partition of a wharf and appurtenant rights, and for an account of the profits received by the defendant while in possession of the estate; but might for an account, on striking out the prayer for a partition. *Hodges v. Pingree*, 14.
4. The *St.* of 1855, c. 194, by which this court "shall have jurisdiction in equity in all cases of fraud," confers no jurisdiction over suits commenced after its passage, and before it took effect. *Wheatland v. Lovering*, 16.
5. Specific performance of an agreement to convey land to a railroad corporation will not be decreed on a bill in equity filed by them more than three years after the other party has refused to perform it, and after they have located their road over other land including but a small portion of this, and after this land has greatly increased in value, without any steps taken by the corporation meantime to enforce the agreement. *Boston & Maine Railroad v. Bartlett*, 384.

See EQUITY PLEADING; LOAN FUND ASSOCIATION, 2; MANUFACTURING CORPORATION, 2, 4.

EQUITY PLEADING.

1. To a bill in equity for an account of sales of a book alleged to have been published by the defendant on the joint account of the plaintiff and himself, an answer which denies that any such book was published during the time alleged, and asserts that the book published by the defendant was a different one, need not render an account of sales. *Armstrong v. Crocker*, 269.
2. A bill in equity by the executrix of her deceased husband alleged that the

plaintiff was inexperienced and unskilled in the care and management and in the value of property, and that the defendant undertook the general management of her affairs, volunteering his advice to her in all matters of business, and that the plaintiff had full confidence in the defendant and relied upon him to advise and aid her in her transactions, and did not buy or sell or lease property without the aid of his judgment. *Held*, that the answer sufficiently met this allegation by stating that the defendant could only refer to the plaintiff's declaration that her husband was in the habit of communicating to her his business transactions; that, although his property was large, it was such that its value and income, if not fully known, could be exactly ascertained by her upon the slightest inquiry; and that the plaintiff never expressed to the defendant any doubt of her capacity to take charge of all her property and protect all her interests, nor had he any doubt thereof; and which then stated in detail the facts of their intercourse, denying that the defendant ever acted for the plaintiff as an agent or in a confidential capacity. *Held, further*, that if the answer alleged that the plaintiff asked of third persons questions relative to her property, it need not state of what persons or concerning what property such questions were asked. *Ib.*

3. An allegation in equity, that the plaintiff repeatedly asked the defendant for his bill, is met by an admission in the answer that the plaintiff asked the defendant what she should pay him. *Ib.*
4. A bill in equity to compel the surrender of a lease alleged that the defendant, before anything was said on the subject by the plaintiff, applied to the plaintiff and solicited of her an extension of the building occupied by him, and a renewal of the lease, and then particularly set forth interviews between them, and that the defendant importuned her to renew the lease, and by these repeated applications and protracted importunities the plaintiff was persuaded to renew the lease on the terms desired. *Held*, that these allegations were sufficiently met in the answer by averring that the plaintiff herself, without any inquiry or allusion to the subject on the defendant's part, inquired if the defendant would so extend the building and take the lease; and by admitting the several interviews set forth in the bill, but averring that they were always conducted pleasantly, and that the defendant always allowed the plaintiff time for consideration; and by wholly denying that any of the pretended grievances, deceptions, fraudulent doings, importunities, persuasions and entreaties alleged in the bill were committed or practised by the defendant. But that an allegation in the bill that the plaintiff asked the defendant if he thought the rent agreed upon was a fair one, and that he answered affirmatively, was material and should be directly met in the answer. *Ib.*

ESTOPPEL.

The owner of property, by joining in a mortgage of it from another person, does not estop himself to assert his title as against any one but the mortgagee; and, in an action of trespass against an officer attaching it as the property of that person, may recover the full value of the property, notwithstanding a

settlement made between the attaching creditor and the mortgagee without the mortgagor's assent. *Cram v. Bailey*, 87.

See PROMISSORY NOTE, 7.

EVIDENCE.

1. In a criminal case, in which the only evidence for the prosecution was the testimony of accomplices, the judge advised the jury to acquit, but instructed them that if upon the whole evidence they were convinced beyond a reasonable doubt of the guilt of the defendant, they should find a verdict of guilty. *Held*, that the defendant had no ground of exception. *Commonwealth v. Price*, 472.
2. A treasurer of a railroad corporation, who had embezzled their funds, called upon a friend of his, who was a surety upon his official bond and stockholder in the corporation, for advice; and he urged him to go to the directors, and make a clean breast of it, and told him that it would be for his interest to make a full confession; but said nothing, in terms, of a prosecution; told him that the disgrace was in doing wrong, not in suffering punishment for it, and he had better stay and meet the punishment; and (as he testified) "advised him as a friend, a son." The next day they went together to see one of the directors, who, on this stockholder suggesting that he had influence with the other directors and could prevent a prosecution, stopped him, saying that he could and would make no promises, did not know what his own power or duty was, but would do all he rightfully and properly could to prevent his arrest and prosecution, and that he must confide wholly in him and his discretion. *Held*, that confessions made after these conversations were admissible in evidence against him. *Commonwealth v. Tuckerman*, 173.
3. On the trial of an indictment for receiving stolen goods, evidence is admissible of conversations between the defendant and the thief, before the commission of the offence, making arrangements for receiving the goods. *Commonwealth v. Jenkins*, 485.
4. In a book of original entry, entries of sales, begun by another person, but finished and the quantities and prices entered by the clerk producing them, are admissible in evidence of the sales, although he has no independent recollection on the subject; and copies of these entries, made by another in a second book, and verified by the witness, are also admissible, in connection with the first book. *Bradford v. Stevens*, 379.
5. In an action by the indorsee against the maker of a negotiable promissory note, the testimony of a bookkeeper who examined the plaintiff's books at time not shown to have been after the indorsement, that the books showed that all the payee's notes had been sent to the indorsee for collection, but he could not say the note in suit was enumerated among those sent, is inadmissible for the plaintiff. *Noxon v. De Wolf*, 343.
6. A deed, under which a party to a suit claims title, being admitted by him on cross-examination to be in his possession, may be ordered to be produced and put in evidence, without calling the attesting witness. *McGregor v. Wait*, 72.

7. The date of a deed is *prima facie* evidence of the time of its execution. *Smith v. Porter*, 66.
8. A deed to "Hiram Gowing, cordwainer," may be shown by parol evidence of the previous negotiations between the parties to have been intended for "Hiram G. Gowing," who was a person of middle age, and not for "Hiram Gowing," his son, who was but thirteen years old. *Peabody v. Brown*, 45.
9. The affidavit of a party to a suit, that he has made diligent search for a deed of assignment to him under the insolvent laws, and that it has been lost or mislaid, and is not to his knowledge recorded, is sufficient to allow the introduction of secondary evidence of its contents. *Brigham v. Coburn*, 329.
10. The testimony of the clerk of a commissioner of insolvency, that he drew the assignment of the estate of an insolvent debtor, and kept no copy of it; but that the blank form of a copy produced by him was the same used by the commissioner, and that he has filled it up from minutes on his docket, and believes it to be a correct copy of the assignment, is sufficient to verify the copy. *Ib.*
11. The presence of the respondent in court pending a bastardy suit, and at the passing of the final order, may be proved by parol evidence. *Power v. Fenno*, 249.
12. The testimony of arbitrators, or a majority of them, is admissible to show whether a certain claim was included in their award. *Hale v. Huse*, 99.
13. A minute upon a magistrate's book of a continuance of the examination of a poor debtor, not in the magistrate's handwriting, nor signed by him, and of which he has no independent recollection, is not sufficient evidence of a legal adjournment of the hearing. *Wetherbee v. Martin*, 245.
14. In replevin of property claimed under a mortgage, the deposition of the subscribing witness to the contents of the mortgage, and to his having seen the property described therein, is admissible to identify the property, although neither the mortgage nor any copy thereof is annexed to the depositions. *Newcomb v. Noble*, 47.
15. A debtor assigned to his creditor a mortgage of \$500 as collateral security for the payment of his debt of \$1400; he was afterward sued on the debt, and judgment rendered against him for the whole debt, and execution issued thereon and put into the hands of an officer, with instructions to collect \$600, or obtain good security therefor; and the officer released the debtor upon receiving a promissory note for \$600, which he indorsed to the creditor, who afterwards collected from the mortgagor the amount of the mortgage. *Held*, that in a suit upon the note the defendant, in order to show that the money received on the mortgage discharged the whole debt, might give in evidence an agreement in writing made by the parties, pending the former suit, by which, upon the payment by the debtor of \$575 (which he had not since paid), the mortgage should be reassigned to him, otherwise judgment to be entered for that sum. *Prescott v. Pulsifer*, 49.
16. The certificate of a marine surveyor and inspector, made in the course of his business, is competent evidence of the seaworthiness of a vessel at that

- time, if supported by his oath that he examined the vessel, and that he has no doubt that the facts stated in it are true, although he has no independent recollection of those facts. *Perkins v. Augusta Insurance & Banking Co.* 812.
17. A question "whether, if the foremast was sprung, the try-sail split and standing rigging such as to need replacing at" a certain port, "the master would probably have known it?" does not depend on nautical skill, and cannot be put to an expert. *Ib.*
 18. A person sent to a foreign port to take charge of a vessel in distress, who ascertains by inquiry the prices of labor and materials necessary to repair vessels there, but has no other knowledge thereof, is not a competent witness on that subject. *Lewis v. Eagle Ins. Co.* 568.
 19. In a controversy between proprietors of adjacent estates as to the width of a 'passage way between them, the descriptions in deeds of the estates to one under whom both proprietors claim title are admissible in evidence. *Brown v. Stone*, 61.
 20. Admissions, made by a wife without her husband's knowledge, are not competent evidence of a way by prescription over land owned by them in her right. *McGregor v. Wait*, 72.
 21. Admissions of a son, residing with his parents and managing their estate, are not competent evidence against them of a right of way over it, without proof of the extent of his agency. *Ib.*
 22. The silence of a tenant for life, when remarks are made in his presence in disparagement of his title, is no evidence against his remainderman. *Ib.*
 23. Conversations before the organization of a corporation, but in contemplation thereof, between persons who subsequently become officers and stockholders therein, are inadmissible against the corporation as evidence of an agreement to organize and transact business as a corporation without paying in the capital required by law; even if accompanied by evidence that the capital stock was afterwards pretended to be, but was not actually, paid in. *Fogg v. Pew*, 409.
 24. Neither the return which an insurance company are obliged by law to make to the secretary of the Commonwealth, nor a contract between them and their agent, is admissible in an action upon a premium note given to them, to show that the company fraudulently held themselves out as solvent, or that their officers were aware of their insolvency; without evidence that these facts were known to the maker of the note, or influenced him to procure the insurance. *Ib.*
 25. Declarations of an agent of an insurance company, who has authority only to obtain applications for insurance and transmit them to the company, are inadmissible to show that the company represented that their capital stock was paid in, when it was not. *Ib.*
 26. Fraudulent representations of the officers of an insurance company, concerning the solvency of the corporation and the payment of their capital stock, are no defence to a suit upon a premium note given to the company, unless these representations were held out at the time when the note was made, and for the purpose of obtaining it. *Ib.*

27. In an action for the price of goods delivered to a third person on the alleged credit of the defendant, the plaintiff cannot give in evidence his previous direction to his servant to refuse a further credit to that person. *Welch v. Merrill*, 91.

See APPEAL; AUDITOR; COVENANT; DEED, 1; DEPOSITION; EMBEZZLEMENT, 3; EXCEPTIONS, 2; EXECUTOR AND ADMINISTRATOR; FORGERY, 6, 8; INSURANCE, 15; JUDGMENT, 2, 3; MUTUAL INSURANCE COMPANY, 1; NUISANCE, 3; PROMISSORY NOTE, 2-5; SPIRITUOUS AND INTOXICATING LIQUORS, 2; WAY, 1; WITNESS.

EXCEPTIONS.

1. A bill of exceptions cannot be sustained unless it states enough of the evidence to show that the judge ruled erroneously and to the prejudice of the party excepting. *Fuller v. Ruby*, 285. *Hewes v. Hanscom*, 336.
2. The refusal of the judge presiding at a criminal trial to allow the defendant's counsel to read to the jury an adjudication by the highest court of another state that a statute like that upon which this prosecution is founded is contrary to the constitution of that state, is no ground of exception. *Commonwealth v. Murphy*, 1.
3. Exceptions do not lie to the discharge of a prisoner on *habeas corpus* by a single judge. *Wyeth v. Richardson*, 240.

See APPEAL; COSTS; JUDGMENT, 1; PROMISSORY NOTE, 4-6; SPIRITUOUS AND INTOXICATING LIQUORS, 4; WITNESS, 3, 4.

EXECUTION.

After a levy of an execution upon an equity of redemption in real estate by sale in a manner not authorized by law, the judgment creditor may obtain a new execution by *scire facias*, under Rev. Sta. c. 73, § 21. *Dewing v. Durant*, 29

See ARREST; POOR DEBTORS, 3.

EXECUTOR AND ADMINISTRATOR.

Under St. 1840, c. 97, providing that a sale of real estate by an executor or administrator under a license shall be valid as against any person claiming under the deceased, though the deed is not delivered within a year, if certain conditions are complied with and the price "duly accounted for," such accounting must be shown by the probate records. *Jewell v. Jewell*, 31.

See LIMITATIONS, 1-3.

EXECUTORY DEVISE.

See TRUST, 5.

FLATS.

1. General rules for the division of flats among coterminous proprietors of land bounding on the seashore must yield to lines established by a partition

affirmed by the court, and acquiesced in by the parties for thirty five years. *Adams v. Boston Wharf*, 521.

Commissioners of partition of land bounded southwesterly on Second Street, northwesterly on B Street, and northeasterly "by the sea," made a return, of which a plan was made part whereon B Street was extended upon the flats at right angles with Second Street: and set off to P. a lot, beginning at the corner of said streets, and bounded southwesterly on Second Street for a certain distance, "then turning at right angles and bounding on land hereinafter assigned to M., and running northeasterly to low water mark, then running northwesterly as the channel runs to B Street, then by B Street as that runs to the corner begun at:" They set off to M. the next lot to the east of this, bounded southwesterly by Second Street a certain distance, "then turning at right angles and running northeasterly to low water mark, then turning again and running by the channel to land and flats hereinbefore set off to P., then turning again and running southwesterly along said land of P. to Second Street:" They left "undivided and unassigned" to G., the respondent in partition, the next lot eastwardly: And their return was accepted by the court, and acquiesced in by the parties for thirty five years. *Held*, that G. had no title in flats westerly of B Street, although independently of the partition they would have come within the lines, as established by the court, of the estate thus divided; or that if he had, no title in flats westerly of B Street was conveyed by a subsequent deed from him, of "a certain piece or parcel of land and flats," bounded southerly on Second Street, beginning at the land of M., and running easterly on said Second Street a certain distance, "then turning at a right angle and running northerly on other land of G. as far as his land extends, then beginning again at the first mentioned point and running northerly on land of M. and parallel to B Street as far as the land of G. extends; it being the intention of this instrument to convey" a certain amount "of upland, together with all the flats to said land belonging, running out as far as G. has a right to go, but without warranty as to the courses of the side lines over said flats; but meaning hereby to sell and convey said upland as above described, together with all the flats to said G. belonging, situated on the westerly side of a line beginning at the southeasterly corner of the granted land on Second Street, and running northerly at right angles with Second Street. *Id.*

See DEED, 2.

FOREIGN CORPORATION.

See SERVICE OF WRIT, 2, 3; TRUSTEE PROCESS, 1.

FORGERY.

- 1 A bill of a bank in another state is a promissory note, within the meaning of the Rev. Sta. c. 127, § 2. *Commonwealth v. Woods*, 477. *Commonwealth v. Thomas*, 483.
- 2 An indictment for knowingly having in one's possession a false, forged and

- counterfeit promissory note is supported by evidence of the possession of a genuine note which has been altered. *Commonwealth v. Woods*, 477.
3. Knowingly having in possession and uttering five false, forged and counterfeit promissory notes, may be charged as one offence in one count. *Commonwealth v. Thomas*, 483.
 4. An indictment is not repugnant and defective, which charges the defendant with the possession of five false, forged and counterfeit promissory notes, and then sets forth certain bills of a bank in another state, and alleges that the defendant "did utter and publish the aforesaid false, forged and counterfeit bank bills as true." *Ib.*
 5. An indictment for having in possession and uttering five counterfeit notes, which sets out four notes, alleges that the fifth "is different from any above set forth," and then sets out one like two of the others, is sufficient to support a conviction. *Ib.*
 6. An indictment for having a counterfeit bank bill at Boston "with intent then and there to utter and pass the same" is supported by evidence of possession with intent to utter and pass it at a place out of the State. *Commonwealth v. Price*, 472.
 7. Possession of a counterfeit bill of a bank in this state, with intent to pass it in another state, is within the Rev. Sta. c. 127, § 8. *Ib.*
 8. Under an indictment for having a counterfeit bank bill with intent to pass it, evidence that the defendant subsequently had in his possession other and different counterfeit bank bills is admissible to show guilty knowledge and intent. *Ib.*

FRAUD.

See BANK; EQUITY, 4; EVIDENCE, 23-26.

FRAUDS, STATUTE OF.

A promise to accept and pay an order for the delivery of stock in a corporation, which the drawee had agreed to pay for certain goods sold to him, is not within the statute of frauds, if those goods have been delivered to him; otherwise, if they have not. *Eastern Railroad v. Benedict*, 212.

See TRUST, 1.

FREIGHT.

See INSURANCE, 18-21; SHIPS AND SHIPPING, 2.

GOODS SOLD AND DELIVERED.

See EVIDENCE, 4; FRAUDS, STATUTE OF.

GRAND JURY.

See INDICTMENT, 1.

HABEAS CORPUS.

See EXCEPTIONS, 3.

HIGHWAY.

See WAY.

HOMESTEAD.

See DEED, 1.

HOUSE OF REPRESENTATIVES.

Under the twenty-first article of amendment of the Constitution of Massachusetts, the mayor and aldermen of Boston, in the county of Suffolk, and the county commissioners in other counties, are empowered to apportion the number of representatives assigned to the county among the representative districts formed by them, under said article, as well as to form the districts; and their doings and returns in the premises are conclusive, and cannot be revised by the house of representatives in judging of the returns of elections and qualifications of its members. *Opinion of Justices, 613.*

HUSBAND AND WIFE.

1. Whether articles of separation, between husband and wife actually living apart, in which the husband covenants with a trustee to provide for the future separate maintenance of the wife, are valid in this commonwealth, *quære. Albee v. Wyman, 222.*
2. Whether a covenant, in articles of separation, that the husband will pay an annuity to the wife during her life, is discharged by her obtaining a divorce and marrying another man, *quære. Ib.*
3. By articles of separation a husband covenanted, in consideration of his wife's withdrawing a libel for divorce, to pay her a sum yearly during her life. The wife afterwards, by another similar libel, obtained a decree for divorce from the bond of matrimony, and for alimony, which by agreement was fixed at the sum payable under the articles; and the wife, after receiving two instalments of such alimony, married another man, whereupon the alimony was reduced by the court to a nominal sum. *Held, that the covenant, if ever valid, was discharged. Ib.*
4. *It seems,* that an action for injury to real estate of a wife may be maintained by her husband alone. *Adams v. Barry, 361.*

See EVIDENCE, 20.

IMPROVEMENTS.

See SCHOOL HOUSE, 3.

INCOME.

See TRUST, 2.

INDICTMENT.

1. A grand jury, without examining witnesses anew, may find an indictment as a substitute for another indictment found by them upon an investigation of the facts at a previous term. *Commonwealth v. Woods, 477.*

2. Whether it is a fatal variance, in setting out a bank bill according to its tenor, to substitute "Cashier" for "Cash"—" *quære*. *Ib*.
3. It is no variance in an indictment to set forth a name as "Droun," which is actually "Drown."— *Ib*.
4. Under the Rev. Sts. c. 137, § 11, a person indicted for an assault with intent to murder may be convicted and sentenced for an assault without felonious intent. *Commonwealth v. Lang*, 11.
5. The eleventh section of the Rev. Sts. c. 137, providing that any person indicted for a felony, and acquitted of part of the offence charged, and convicted of the residue, may be adjudged guilty of the offence, if any, substantially charged in the residue of the indictment, is not unconstitutional as conflicting with the twelfth article of the Declaration of Rights. *Ib*.

See FORGERY, 2-6; LARCENY; NUISANCE.

INSOLVENT CORPORATION.

See CORPORATION, 2; MANUFACTURING CORPORATION, 2, 3.

INSOLVENT DEBTORS.

1. The assignee of an insolvent debtor may maintain an action in his own name upon a bond for the liberty of the prison limits, made to the insolvent after the appointment of the assignee, to obtain a release from arrest on an execution issued before such appointment upon a judgment on a debt which would pass to the assignee by the assignment. *Wetherbee v. Marvin*, 245.
2. The individual liability of stockholders or officers of a manufacturing corporation for debts of the corporation under the Rev. Sts. c. 38, and St. 1851, c. 315, cannot be proved against their estates in insolvency. *Bangs v. Lincoln*, 604.
3. The assent of three fourths in value of the creditors of an insolvent debtor, which is requisite to his second discharge under St. 1844, c. 178, § 5, must be filed within six months of the date of the assignment. *Wills v. Prichard*, 327.
4. Jurisdiction in proceedings in insolvency, pending before a commissioner when the St. of 1856, c. 284, took effect, vested upon his subsequent death in the judge of insolvency, and not in the judge of probate. *Osgood v. Fernald*, 57.
5. If a partnership, whose principal business is to purchase supplies for and sell iron manufactured at iron works owned by one of the partners, becomes insolvent, a claim for supplies sold and delivered to the partnership, without knowledge that that partner only was interested in the works in which they were to be used, can be proved against the partnership estate only, under St. 1838, c. 163, § 21, and not against the separate estate of that partner. *Tremlett v. Hooper*, 254.
6. Materials charged and shipped by a partnership in their usual course of business, to works of one partner, on the day of the failure of all the partners, are to be treated as the property of that partner, and not of the partnership, in marshalling their assets in insolvency, under St. 1838, c. 163, § 21. *Fisher v. Minot*, 260.

7. Under *St. 1838, c. 163, § 21*, where a partnership and its members are in insolvency under one commission, and the separate estate of one partner is more than enough to pay his separate debts, the surplus of that estate over such debts is to be added to the partnership estate, and applied to the payment of joint debts, before paying interest on the separate debts. *Thomas v. Minot*, 263.

See ADVANCEMENT; BOND; EVIDENCE, 9, 10; MANUFACTURING CORPORATION, 2; PRINCIPAL AND AGENT, 2; TRUSTEE PROCESS, 1; WRIT.

INSURANCE.

I. Fire Insurance.

1. Two partners, in an application for insurance on a building, which was required to contain "a full, fair and substantially a true representation of all the facts and circumstances respecting the property, so far as they are within the knowledge of the assured and are material to the risk," stated that they owned the land on which it stood. In fact, one of them, to whom the policy was made payable, owned it, and the other was charged on their books with half its cost. The partnership was afterwards dissolved, and all that owner's interest in its assets transferred to his copartner, to whom the insurers, with notice of the facts, agreed that the policy should "stand good." *Held*, that the insurers were liable for a loss by a subsequent fire. *Collins v. Charlestown Mutual Fire Ins. Co.* 155.
2. A description in an application for insurance of a building as used "for the manufacture of lead pipe," or "of lead pipe only," includes the manufacture of wooden reels on which to coil the lead pipe, if essential to the reasonable and proper carrying on of the business of manufacturing lead pipe. *Ib.*
3. In a policy of insurance upon a saw-mill, the assured covenanted "that the representation given in the application for this insurance contains a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property insured, so far as the same are known to the assured and material to the risk; and that if any material fact or circumstance shall not have been fully represented, the risk hereupon shall cease and determine, and the policy be null and void." The applicant, to a question "Is a watch kept upon the premises during the night? Is any other duty required of the watchman than watching for the safety of the premises?" answered, "A good watch kept; men usually at work; watchmen work at the saws;" and answered in the negative this question: "Is the building left alone at any time after the watchman goes off duty in the morning till he returns to his charge in the evening?" In fact, no watch was ever kept on the premises after twelve o'clock on Saturday night, or at all on Sunday night, other than the workmen sleeping there, who were instructed to and habitually did examine the mill with reference to fires before going to bed; and the fire occurred on Sunday night, when no one was on the premises. *Held*, that the term "good watch" must be interpreted to mean "suitable" or "proper watch"; and that it was for the jury to decide whether the watch kept was a

suitable and proper one, and whether the risk was affected by the watch actually kept, as compared with the one stipulated for. *Parker v. Bridgeport Ins. Co.* 302.

4. Insurance against fire was effected on goods "contained in a granite store"; one of the walls gave way, and half of the store and the whole of the adjoining building fell; before there was time to remove the goods, fire broke out in that building. *Held*, that the insurers were liable for damage from fire, and from water used to extinguish it, to goods not displaced or injured by the fall. *Lewis v. Springfield Fire & Marine Ins. Co.* 159.

II. Life Insurance.

5. Under a policy of life insurance, to "terminate in case the premium charged shall not be paid in advance on or before the day at noon on which the same shall become due and payable," if the day of payment falls on Sunday, the premium is not payable until Monday, even if the assured dies on Sunday afternoon. *Hammond v. American Mutual Life Ins. Co.* 306.

III. Marine Insurance.

6. A policy of insurance from an insurance company established in another state, signed by their president and secretary there, but not to be valid until countersigned by their agent here, and issued by such agent here, is to be interpreted by the law of Massachusetts; and one third new for old is therefore to be deducted in estimating a constructive total loss under it. *Heebner v. Eagle Ins. Co.* 131.
7. This indorsement upon a policy of insurance, "Pay under the within policy to J. S. or order," is only an order to pay him the amount of any loss, and not an assignment of the policy; and if the policy stipulates that it shall "be void in case of its being assigned, transferred or pledged without the previous consent in writing of the insurers," an assignment of the policy and assent of the insurers cannot be shown by oral evidence. *Minturn v. Manufacturers' Ins. Co.* 501.
8. A vessel was insured "at and from New York to Gibraltar, and at and from thence to Tarragona, with liberty of using one port (European) between Tarragona and Gibraltar, and at and thence to New York." Four months after, this memorandum was indorsed on the policy: "Permission is given to stop at one other port between Tarragona and Gibraltar, paying one fourth additional premium if liberty is used." *Held*, that this gave permission to stop between Tarragona and Gibraltar upon the homeward voyage from Tarragona, but not to stop at Gibraltar also. *Perkins v. Augusta Ins. & Banking Co.* 312.
9. A policy of insurance on a vessel is not avoided by her going out of her course to obtain necessary medical assistance for the captain's wife; and the question of the necessity is for the jury. *Ib.*
10. Taking on board water and additional cargo, at a port into which a vessel has gone to obtain necessary medical assistance, does not avoid a policy of insurance on the vessel, unless it increases the delay or the risk. *Ib.*

11. A policy of insurance on a ship against "total loss only," even if a time policy, covers a constructive total loss. *Heebner v. Eagle Ins. Co.* 181.
12. Under a policy of insurance upon a steamer, which exempts the insurers from liability for breaking of the machinery unless occasioned by stranding, the insurers, if the vessel is injured first by perils of the sea and afterwards by stranding, are liable only for so much of the injury as the assured prove to have been occasioned by the stranding. *Ib.*
13. In computing a constructive total loss on a vessel stranded on the west coast of the United States, an assessor allowed two months' interest on the funds raised for repairs. *Held*, that this assessment could not be increased by the court without evidence to overcome the assessor's report. *Ib.*
14. Under an open policy of insurance in common form, containing the usual memorandum clause, and also this clause, "partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates is excepted," the insurers are liable for a constructive total loss of tin plates; and if a number of boxes of tin plates, shipped and valued as one parcel, is damaged by the stranding of the ship, carried to the nearest market and there sold for less than half its valuation in the policy, deducting the necessary expenses of the transportation and sale, and duly abandoned, it is a constructive total loss. *Kettell v. Alliance Ins. Co.* 144.
15. In an action on a policy of insurance for a constructive total loss, if the plaintiff in his claim of loss has given the insurers credit for a certain amount received for salvage, he is not bound to prove that he did not receive more. *Lewis v. Eagle Ins. Co.* 508.
16. Under a policy which exempts the insurers from liability for any partial loss on certain goods perishable in their nature, unless it amount to seven per cent. and happen by stranding; and for partial loss on other goods or on the vessel or freight, unless it amount to five per cent.; the insurers are liable for a partial loss exceeding five per cent. on the freight of a cargo consisting of such perishable articles and of other goods, although not occasioned by stranding. *Lord v. Neptune Ins. Co.* 109.
17. Insurers on the freight of a ship for a voyage are not liable for a total loss, where there has been no total loss of the ship, and the goods could have arrived in *specie* at the port of destination; although the ship has been obliged by a peril insured against to put back to her port of departure, and the goods, after being damaged by that peril to the extent of more than half their value, or to the extent of goods yielding more than half the freight, have been sold there according to the interests of all parties except the insurers on freight. *Ib.*
18. If a ship is obliged by perils of the sea to put back to her port of departure, and her cargo is there sold by the master for the interest of all parties except the insurers on freight, the shipowner is not entitled to freight; and, if he defends, on a claim of freight, a suit brought against him by the owner of the cargo for the proceeds of such sale, he cannot recover from the underwriters on freight any part of the expenses of such defence. *Ib.*

19. Insurers on freight are liable for the freight of goods jettisoned, without waiting for the adjustment of the general average; although the policy provides that any loss "shall be paid within sixty days after proof and adjustment thereof." *Ib.*
20. Under a policy of insurance on freight from Boston to San Francisco, and thence to port or ports in the East Indies and to a port of discharge in the United States, with liberty to return with a cargo of guano from the Chincha Islands instead of the East Indies, freight earned on the outward voyage is not to be deducted from the valuation in the policy, in computing a constructive total loss of freight on the passage from the Chincha Islands home. *Thwing v. Washington Ins. Co.* 443.
21. The condemnation and sale of a ship at an intermediate port, in consequence of damages sustained by perils insured against, entitle the owner to abandon and claim for a total loss of the freight, although the cargo has been carried to its destination in another vessel for a price equal to the freight which would have been paid if the original ship had completed her voyage and delivered her cargo and the stipulated freight has been paid by the consignees. *Ib.*
22. It is a sufficient abandonment of a ship injured by perils of the sea, and therefore surveyed and condemned on the west coast of the United States, in time of peace, to state in a notice to the underwriters that the assured "having received information of the condemnation of" the ship "at Humboldt, California, hereby abandons all in said vessel insured by" their policy "and claims as for a total loss." *Heebner v. Eagle Ins. Co.* 131.
23. A letter of abandonment of a vessel upon the ground that, in consequence of sea perils, "being found irreparable on survey, she was condemned and sold," sufficiently states the cause of abandonment, if the vessel was so much damaged that the costs of repair would exceed half her value, deducting one third new for old. *Perkins v. Augusta Ins. & Banking Co.* 312.
24. A letter from the master of a ship to the owner, stating that she had been surveyed and condemned on account of the expense of repairs, but not stating the cause of her injuries, was sent by the owner to the underwriters with a letter of abandonment, which they declined to accept. The owner afterwards, within thirty days after receiving the master's letter, and immediately after the master's return, called with the master upon the underwriters, exhibited to them the protest and the survey, and claimed a total loss. The protest stated that the vessel met with strong breezes and a heavy sea, and was with difficulty pumped free of water, and, the leak continuing the same, anchored; and the survey declared that she was incapable of proceeding to sea unless recaulked and recoppered, and that the cost of repairs with incidental charges would exceed her value. *Held*, that the abandonment was sufficient. *Thwing v. Washington Ins. Co.* 443.

See EVIDENCE, 16-18, 24-26; PLEADING, 6.

INSURANCE COMPANY.

The holder of a policy of insurance, made by a stock company when under li-

bility for losses to an amount equal to their capital stock, cannot maintain an action on the Rev. Sts. c. 87, § 18, against the directors for a loss under his policy, without first recovering a judgment against the company, fixing the amount of the loss. *Kinsley v. Rice*, 325.

See MUTUAL INSURANCE COMPANY.

INTEREST.

See INSOLVENT DEBTORS, 7; JUDGMENT, 2; SHIPS AND SHIPPING, 2.

JUDGMENT.

1. After judgment has been rendered in the superior court, and exceptions allowed, though not entered in this court, the superior court cannot enter final judgment; but the original judgment may be affirmed by this court on complaint under the Rev. Sts. c. 82, § 14. *Gassett v. Cottle*, 375.
2. A judgment for the plaintiff in an action to recover an instalment of interest on a promissory note, in defence to which want of consideration is relied on, is conclusive evidence of consideration in a subsequent action between the same parties to recover the principal of the note. *Black River Savings Bank v. Edwards*, 387.
3. A verdict and judgment against a city, in an action for personal injuries occasioned by a defect within the limits of a highway, are conclusive evidence in a subsequent action by the city against a tenant of the land (who had notice of the pendency of the former action and of the city's intention to hold him responsible for all damages recovered therein, and had opportunity to furnish evidence, and testified at the trial, although he was not requested to and did not take upon himself the defence of that action) that the highway was defective, that the person was injured there, while using due care, and of the amount of the injury; but not of the tenant's liability to keep the place in repair, nor of his having neglected to do so, nor of such negligence having been the sole cause of the injury. *City of Boston v. Worthington*, 496.
4. A judgment for the defendant in an action for work done under a contract, upon the ground of imperfect performance of the work, is a bar to a subsequent action by him to recover damages for such nonperformance. *O'Connor v. Varney*, 231.

See ARBITRAMENT AND AWARD; EVIDENCE, 15; INSURANCE COMPANY; SERVICE OF WRIT, 1, 2.

JURISDICTION.

See EQUITY, 1; PLEADING, 3; SERVICE OF WRIT; TRUSTEE PROCESS, 3.

JURY.

1. Whether it is ground for setting aside a verdict, that one of the jurors was not an inhabitant of the county, and that this was not known before verdict to the party against whom the verdict was rendered—*quere*. *Commonwealth v. Jenkins*, 485.

2. Since the *St.* of 1855, c. 152, as well as before, the jury in a criminal case are to be governed by the instructions of the court in matter of law. *Commonwealth v. Rock*, 4.

See APPEAL ; EXCEPTIONS, 2.

LANDLORD AND TENANT.

1. In an action to recover rent, the plaintiff counted on a lease to the defendant, an assignment thereof from the lessor to the plaintiff, notified to the defendant, and the defendant's consequent liability to him for use and occupation ; and introduced evidence, without objection, that the defendant assented to such assignment, and afterwards attorned and paid rent to him. *Held*, after verdict for the plaintiff, that the defendant could not object to the variance between the declaration and the proof. *Fuller v. Ruby*, 285.
2. A lessee's covenant "to pay all taxes or duties levied or to be levied" on the premises during the term does not bind him to repay the expenses of paving the sidewalk in front of the premises, required of the lessor by the town under authority of a statute. *Twycross v. Fitchburg Railroad*, 293.
3. If a lease contains a covenant not to underlet or permit any other person to occupy without the lessor's assent, and that any breach of the lessee's covenants shall terminate his estate therein ; an agreement of the lessee to assign the demised premises for the residue of the term is not complied with by an assignment duly executed by him, but not assented to by his lessor. *Austin v. Harris*, 296.
4. A covenant in a lease "that no alteration or addition shall be made in or to the premises without the consent of the lessor" does not relieve the lessee from liability for injuries resulting to a third person from want of repair of the premises. *City of Boston v. Worthington*, 496.
5. Notice to a tenant at will that his landlord has made a lease of the premises to another person need not state that such lease is in writing. *Mizner v. Munroe*, 290.
6. The authority of an attorney by whom a notice to a tenant at will that his landlord has leased the premises to another is signed need not be known to the tenant. *Ib.*
7. Whether the eviction of a tenant by his landlord from part of the demised premises suspends the entire rent—*quære*. *Fuller v. Ruby*, 285.
8. Interruption by a landlord of his tenant's occupation, without evicting him, does not suspend the rent, either in whole or in part. *Ib.*

LARCENY.

1. An indictment for larceny of property pledged and in the possession of the pledgee may describe it as the property and in the possession of the pledgor. *Commonwealth v. O'Hara*, 469.
2. An indictment for stealing bank bills sufficiently describes them as "sundry bank bills, of some banks respectively to the said jurors unknown, of the

amount and value in all of thirty eight dollars, of the property, goods and chattels" of a person named. *Commonwealth v. Grimes*, 470.

See EVIDENCE, 3.

LEASE.

See LANDLORD AND TENANT.

LICENSE TO SELL REAL ESTATE.

See EXECUTOR AND ADMINISTRATOR.

LIEN.

1. A mechanic who has agreed to repair and alter stereotype plates, in consideration of being allowed to do the owner's printing for an indefinite time, has no lien on the plates on account of repairs and alterations, when, after several years, the owner withdraws the printing from him. *Stickney v. Allen*, 352.
2. A lien for work done on chattels is lost by voluntarily surrendering the possession of them to the owner or his agent. *Ib.*

See MECHANICS' LIEN ; SHIPS AND SHIPPING, 2 ; TENDER, 2.

LIFE INSURANCE.

See INSURANCE, II.

LIGHT AND AIR.

By the law of Massachusetts, before *St.* 1852, c. 144, the mere uninterrupted continuance for more than twenty years of a window with a projecting sill, overlooking the land of another, did not necessarily create any easement of light or air. *Rogers v. Sawin*, 376.

LIMITATIONS, STATUTE OF.

1. A claim against an administrator, for services performed for his intestate's estate while under his charge, is not taken out of the statute of limitations by a letter from the administrator to the creditor, saying : " On reflection, I do not think what labor you performed for the estate would be worth \$100. Most of your labor was directly for or on account of the widow. My impression is, that you could not collect directly of me, as administrator, anything. It must be done through the widow. I do not mention this legal objection to get rid of anything, but to direct you in settlement with the widow. When the matter comes up, I shall be disposed to do what is right and just. I think you had better do something at once towards settlement with the widow, as I want to square up things all round." *Rhoades v. Allen*, 35.
2. The *St.* of 1855, c. 283, excepting from the operation of the *St.* of 1852, c. 294, § 1, (which limited the time of bringing actions against executors and administrators to two years from the filing of their official bond,) any right which had accrued or existed against any deceased person or his executor or

- administrator prior to its passage, does not revive a right of action barred by the *St.* of 1852 before the passage of the *St.* of 1855. *Page v. Melvin*, 208.
3. A remainderman, during the continuance of the life estate, is under "legal disability" within the meaning of *St.* 1817, c. 190, § 12, so that he may bring an action within five years after the termination of the life estate to recover land sold and conveyed by an executor under a license, more than five years before the commencement of the action. *Jewett v. Jewett*, 31.

LOAN FUND ASSOCIATION.

1. Under a by-law of a loan fund association, providing that "in case any member by reason of sickness or removal, or through misfortune, is unable to continue the payment of his subscription, he may give notice to the secretary of an intention to withdraw from the association; and in case the directors are satisfied as to the grounds of withdrawal, his whole amount of subscription shall be returned except the entrance fee;" and that "any person wishing to withdraw for the above reasons or otherwise," and who shall have been a member for a certain time, "and be clear of the books," shall be entitled to a certain interest on that amount; any person having been a member for that time, and "clear of the books," may withdraw without leave of the directors. *Fuller v. Salem & Danvers Loan & Fund Association*, 94.
2. The *St.* of 1854, c. 454, § 5, conferring on this court jurisdiction in equity of all disputes between loan fund associations and their members, does not affect the right of any member to sue the association at law. *Ib.*

LORD'S DAY.

See INSURANCE, 5.

LUMBER.

See SALE.

MANUFACTURING CORPORATION.

1. A manufacturing corporation under the laws of this commonwealth cannot form a partnership with an individual. *Whitenton Mills v. Upton*, 582.
2. A manufacturing corporation and an individual who have actually made a contract of partnership, and, either with or without the assent of all the stockholders of the corporation, acted and held themselves out to third persons as partners for many years, and contracted debts as such, cannot, upon the petition of such individual, be put into insolvency as a partnership, under *Sts.* 1838, c. 163, and 1851, c. 327; and proceedings in insolvency so instituted will be suspended by this court upon the application of the corporation. *Ib.*
3. *It seems*, that the payment of dividends and preferred debts in insolvency out of the estate of a manufacturing corporation does not diminish the liability of its directors under the *Rev. Sta.* c. 38, § 25, for the excess of its debts over its capital stock. *Merchants' Bank v. Stevenson*, 232.
4. The liability of directors of a manufacturing corporation under the *Rev. Sta.* c. 38, §§ 25, 29, 31, for the excess of its debts over its capital stock, must be

enforced by bill in equity, and not by action at law, if the debts for which the directors are so liable amount to more than such excess. *Ib.*

See INSOLVENT DEBTORS, 2.

MAYOR AND ALDERMEN.

See HOUSE OF REPRESENTATIVES.

MASTER AND SERVANT.

1. In an action by a servant against his master for injuries sustained from the explosion of a steam boiler used in his business, the plaintiff introduced evidence without objection that there was no such fusible safety plug on the boiler, as was required by statute; and the presiding judge excluded evidence of a custom among engineers not to use such a plug; and instructed the jury that if the defendant knowingly used the boiler without the plug, and the want of it caused the accident, the plaintiff was entitled to recover; and refused to instruct them that if the defendant used all the appliances for safety, that were ordinarily used in such establishments as his, he was not liable in respect to this boiler, although he did not use the fusible plug. *Held*, that the defendant had no ground of exception. *Cayzer v. Taylor*, 274.
2. Ordinary care must be measured by the character and risks and exposures of the business; and the degree required is higher where life or limb is endangered, or a large amount of property is involved, than in other cases. *Ib.*
3. A master is responsible to his servant for injuries occasioned by the negligence of an incompetent fellow-servant, knowingly or negligently employed by the master. *Ib.*
4. A master is liable to his servant for injuries resulting from a defect in his machinery, although the negligence of a fellow-servant contributes to the accident. *Ib.*

MECHANICS' LIEN.

Under *St.* 1855, c. 231, giving a lien upon ships for labor or materials, to be enforced by petition to the court of common pleas "in the manner provided by" the *Rev. Sts. c. 117, §§ 4 & seq.*, a petition cannot be filed until the debt sought to be secured has remained unpaid sixty days after it has been payable, as provided by the *Rev. Sts. c. 117, § 4*, in case of liens on buildings. *Tyler v. Currier*, 54.

MILITIA.

See CORPORATION, 1.

MONEY HAD AND RECEIVED.

See BANK.

MORTGAGE.

I. *Of Real Estate.*

See EQUITY, 2; EVIDENCE, 15; RAILROAD, 2, 3.

II. *Of Personal Property.*

1. A mortgage of leather, cut and prepared for the manufacture of shoes, covers shoes subsequently made from it by the mortgagor. *Putnam v. Cushing*, 334.
2. A mortgagee of chattels may maintain replevin for them after their attachment by trustee process against the mortgagor, without making the demand required by Rev. Sts. c. 90, §§ 78, 79. *Ib.*
3. A notice, signed by a mortgagee of personal property, and delivered to a deputy sheriff who has attached the property on a writ against the mortgagor, is sufficient, under Rev. Sts. c. 90, § 79, if it notifies him to deliver up the property, and describes the mortgage and the notes secured thereby, although it does not contain an express demand of payment. *Brewster v. Bailey*, 37.
4. A demand of payment under Rev. Sts. c. 90, § 79, by a mortgagee of personal property on an attaching officer, may state the full amount of the debt, without deducting what the mortgagor might deduct on the ground of a usurious consideration. *Ib.*

See ESTOPPEL; EVIDENCE, 14; PAYMENT; RAILROAD, 2, 3; SHIPS AND SHIPPING, 1.

MUTUAL INSURANCE COMPANY.

1. The record of losses kept by a mutual insurance company is sufficient *prima facie* evidence that such losses have occurred, in an action to recover an assessment laid upon the members. *People's Mutual Ins. Co. v. Allen*, 297.
2. An assessment by a mutual insurance company is valid that is based upon a computation of the losses from month to month, and includes in the losses chargeable upon each policy all those of the entire month in which it expires, excluding those of the month in which it began. *Ib.*
3. A premium note, payable in such portions and "at such times as the directors may agreeably to their by-laws require, to a mutual insurance company, whose by-laws provide that the deposit note shall be double the premium, and "that on all policies for less than a year the deposit note may be for such a sum as the president may determine;" and which has issued such policies, with a deposit note of one dollar and a premium paid of a larger sum; is not invalidated by a slight disproportion, occasioned by laying an assessment on the deposit notes only, instead of the amount of the premiums and deposit notes. *Ib.*
4. An assessment by a mutual insurance company is not invalid because it is made to cover losses occasioned by bad investments; nor because it is laid in place of a previous illegal assessment which the directors have not enforced nor because in consequence thereof it has been delayed for some months. *Ib.*

See PROMISSORY NOTE, 8, 9.

NAME.

See INDICTMENT, 3.

NEGLIGENCE.

See JUDGMENT, 3; MASTER AND SERVANT.

NOTICE.

See JUDGMENT, 3; POOR DEBTORS, 1; SCHOOL HOUSE, 2; SERVICE OF WRIT, 2.

NUISANCE.

1. An indictment for a nuisance by keeping and maintaining "a tenement" in a certain street and city, used in a manner prohibited by *St. 1855, c. 405*, need not more particularly describe the place so used. *Commonwealth v. Skelley*, 464.
2. An indictment, which avers that the defendants, on a day named and on divers other days and times between that and another day, did knowingly keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill fame, by them used and kept as a house of ill fame, and resorted to for the purpose of prostitution and lewdness; and for their own lucre and gain, certain persons, as well men as women, of evil name and fame and of dishonest conversation, to frequent and come together, did unlawfully and wilfully cause, permit and procure, and, as well in the night as in the day, did suffer and permit to be and to remain whoring; to the common nuisance of all good citizens; sufficiently states a nuisance under *St. 1855, c. 405*; and is not bad for duplicity as stating also the common law offence of keeping a disorderly house. *Commonwealth v. Hart*, 465.
3. On the trial of an indictment on *St. 1855, c. 405*, for keeping a building used in the manner declared by that statute to be a common nuisance, no proof is required of the allegation in the indictment of the building's "being a common nuisance to the great injury and common nuisance of all the peaceable citizens." *Commonwealth v. Buxton*, 9.

OFFICER.

See ARREST; ESTOPPEL; EVIDENCE, 15; SPIRITUOUS AND INTOXICATING LIQUORS, 5.

ORDER.

See DAMAGES, 1; PLEADING, 5.

PARISHES AND RELIGIOUS SOCIETIES.

See TRUST, 5.

PARTITION.

See EQUITY, 3; FLATS.

PARTNERSHIP.

1. A partner, who upon the dissolution of the partnership has received all the partnership assets, and agreed to apply them to the payment of the outstanding debts, for which they are sufficient, is not liable to an action at law by his

copartner, for the amount of a partnership debt, which he has been obliged to pay, without showing a final settlement of the partnership business, or that there are no other debts outstanding. *Shattuck v. Lawson*, 405.

2. An agreement of a partner with his copartner upon the dissolution of the partnership, to apply to the best of his judgment the partnership assets towards its outstanding debts, will not support a declaration alleging that the defendant agreed to pay all the outstanding debts of the partnership, and neglected and refused to do so. And the defendant may avail himself of this variance under an answer admitting the execution of the agreement (a copy of which is annexed to the declaration) and denying all the other allegations of the plaintiff. *Ib.*

3. In the absence of any special agreement or usage, one partowner of a ship, who has contributed with the others, in proportion to their interests, to her outfit for a whaling voyage, is not liable, while the adventure is unfinished, to an action at law for his proportion of the amount of a bill of exchange drawn by the master in a foreign port upon the managing owner and paid by him; and such liability is not therefore the subject of a set-off in an action at law. *Starbuck v. Shaw*, 492.

See **INSOLVENT DEBTORS**, 5-7; **INSURANCE**, 1; **MANUFACTURING CORPORATION**, 1, 2; **TAX**; **TRUST**, 1.

PAYMENT.

An agreement between the maker and the payee of a promissory note, that it shall be deemed to be paid by being allowed in discharge of a mortgage from the payee to a third person, cannot have that effect without the assent of that person. *Hewes v. Hanscom*, 336.

See **EVIDENCE**, 15.

PERPETUITY.

See **TRUST**, 5.

PLEADING.

I. *Parties to Actions.*

See **HUSBAND AND WIFE**, 4; **INSOLVENT DEBTORS**, 1; **PRINCIPAL AND AGENT**, 1.

II. *Declaration.*

See **DAMAGES**, 6; **LANDLORD AND TENANT**, 1; **PARTNERSHIP**, 2; **SLANDER**.

III. *Answer, Demurrer, &c.*

1. The objection that one of the plaintiffs in an action brought by trustees had not accepted the trust at the date of the writ, cannot first be taken at the argument before the full court upon the report of one of the judges. *Henshaw v. Bank of Bellows Falls*, 568.

2. Nonjoinder of a defendant in an action of contract can be pleaded in abatement only. *Shelton v. Banks*, 401.
3. The objection that a transitory action brought by a citizen of another state is not brought in the county of the defendant's residence or place of business, as required by *St.* 1856, c. 70, cannot be first taken after verdict. *Barry v. Page*, 398.
4. The incorporation of defendants sued as a corporation may be denied after they have appeared generally and filed an affidavit of merits. *Greenwood v. Lake Shore Railroad*, 373.
5. In an action upon an order to deliver stock, if the declaration alleges a demand according to the tenor of the order, the want of any demand cannot be taken advantage of under an answer which only denies the existence and acceptance of the order. *Eastern Railroad v. Benedict*, 212.
6. In an action on a policy of insurance, under an answer alleging a false and fraudulent representation by the assured of the value of the vessel insured, the defendants may prove a false, though not fraudulent, representation. *Lewis v. Eagle Ins. Co.* 508.
7. It seems, that under the *St.* of 1852, c. 312, a demurrer to part of one count in a declaration is admissible, even if the matters alleged are divisible in their nature. But if admissible, it goes merely to the manner of stating the cause of action and cannot be argued before the full court, until the whole case has been tried by a single judge. *Minturn v. Manufacturers' Ins. Co.* 501.

See PARTNERSHIP, 2.

POOR DEBTORS.

1. If notice of an intention to take the poor debtors' oath is served upon the creditor less than a mile from the place of examination, the time allowed him for travel under *St.* 1855, c. 444, § 4, need only be a proportionate fraction of an hour. *Jacot v. Wyatt*, 236.
2. A poor debtor who has, pursuant to *St.* 1855, c. 444, entered into a recognizance to deliver himself up within ninety days for examination, giving notice to his creditor and making no default, and to abide the final order of the magistrate, and who does attend before the magistrate, is not bound to surrender himself to the officer until the magistrate has certified a refusal to admit him to the poor debtors' oath. *Ib.*
3. A magistrate's refusal of an application to be admitted to take the poor debtors' oath, under *St.* 1857, c. 141, upon the ground that the debtor has property, is conclusive; and an appeal taken from the decision of the magistrate finding him guilty upon charges of fraud filed at the same time does not exempt him from arrest on the execution. *Fletcher v. Bartlett*, 491.

See BAIL, 2; EVIDENCE, 13; INSOLVENT DEBTORS, 1.

POWER.

See TRUST, 3, 4.

PRINCIPAL AND AGENT.

1. A foreign principal may maintain an action in his own name for goods sold by his agent here, although no agency is disclosed at the time of the sale. *Barry v. Paige*, 398.
2. A factor, who takes a promissory note for goods sold on account of his consignor, and gives him reasonable notice of this and of the subsequent insolvency of the purchaser, does not, by proving the note under the insolvent laws and taking a dividend thereon, render himself liable for the full amount of the note, if he uses reasonable care and skill; although the consignor resides in another state, and his claim against the purchaser, if not proved, would not be barred by the discharge in insolvency. *Gorman v. Wheeler*, 362.

See BANK; EMBEZZLEMENT; EVIDENCE, 21; LANDLORD AND TENANT, 5, 6;
PROMISSORY NOTE, 6; SHIPS AND SHIPPING, 2.

PROBATE COURT.

See EXECUTOR AND ADMINISTRATOR.

PROMISSORY NOTE.

1. A promissory note, given by a widow to a creditor of her deceased husband for the amount of his debt, is void for want of consideration, if the husband has left no estate or assets, though the creditor gives the widow at the same time a receipted bill acknowledging payment from her husband's estate by the note. *Williams v. Nichols*, 83.
2. The presentment of a promissory note at the place of its date is sufficient, in the absence of proof that the holder at its maturity knew that the maker resided elsewhere. *Smith v. Philbrick*, 252.
3. In an action by an indorsee against the maker of a negotiable promissory note, indorsed by the payee in blank, to which the defence is failure of consideration, the presumption is that it was transferred to the plaintiff on the day of its date, unless the defendant shows that the note was indorsed after maturity, or remained the property of the payee after the indorsement. *Noxon v. De Wolf*, 343.
4. In an action by an indorsee against the maker of a negotiable promissory note, payable at a future day, and indorsed in blank by the payee, the judge refused to instruct the jury that "the burden of proof, the evidence being contradictory, was on the plaintiff to show that the note was discounted by him before it became due;" and instructed them that "if the plaintiff discounted the notes before they were due, and for a valuable consideration, in good faith, he was entitled to recover," and that "the presumption from the notes themselves was that they were indorsed on the day of their date; and if they were shown to have been in the hands of the payee after that time and before they were due, the presumption continued that the indorsement was made after the time when they were thus shown to be in the hands of the payee, and before they were due; and if the evidence left it in doubt, the burden of proof was on the defendant to show that the notes were passed to the plaintiff

after they were due, or that they remained the property of the payee." The defendant did not specifically except to this instruction, nor call the attention of the court to the distinction between *prima facie* evidence and changing the burden of proof. *Held*, that he had no ground of exception. *Ib.*

5. In an action upon a promissory note, the consideration of which was denied by the defendant, the judge instructed the jury that the burden was on the plaintiff to establish a consideration, and did not shift upon the defendant; that the note, containing the words "value received," in law imported a consideration, and upon the evidence of the note itself the plaintiff would be entitled to recover, unless there was some other evidence to affect it; yet the burden was upon the plaintiff to satisfy the jury upon all the evidence and by the preponderance of evidence that there was a consideration; that if the jury could not say upon all the evidence whether the testimony introduced was true, or so much was true as to affect the credit to be given to the note, the note would enable the plaintiff to recover; and that if the defendant did not himself receive the consideration, the note was still *prima facie* evidence of a consideration. *Held*, that the defendant had no ground of exception. *Black River Savings Bank v. Edwards*, 387.
6. In an action by a corporation upon a promissory note payable to them and received by their treasurer, the judge refused to instruct the jury that to constitute a consideration it must be shown that the defendant had some value therefor, or that the plaintiffs, at the time of making it, intentionally, and as the consideration of the note, and at the defendant's request, agreed to do or did some act believed to be prejudicial to themselves; and also refused to instruct the jury that, as the plaintiffs adopted the note, they adopted it in all respects, according to the understanding and agreement of their treasurer and the defendant, and affected by the knowledge of all the facts known to them, and if as between them it was without value and for the accommodation of the plaintiffs, then, whatever uses their treasurer made or intended to make of it, the plaintiffs could not recover; and instructed the jury that if the plaintiffs received some prejudice, at the request or procurement of the defendant, it was a sufficient consideration; and that if the defendant and the treasurer knew that the object of the note was to deceive the plaintiffs, or to obtain money for the treasurer from them, that was enough to create a consideration, if the money was obtained upon it accordingly from the plaintiffs. *Held*, that the defendant had no ground of exception. *Ib.*
7. In an action upon a promissory note payable to a bank, the jury were instructed that if no money was had by the defendant on the note, and yet was given by him to the plaintiffs' treasurer to aid him in getting money from the bank, and in concealing the condition of the bank, or to aid in any illegal transaction, or with reasonable cause to know that it would be so illegally used, and the money was accordingly obtained by the treasurer from the bank, the defendant would be estopped, because this would constitute no defence to the note, he being estopped to allege his own fraud. *Held*, that upon the facts supposed there would be no defence; and that the statement that the defendant would be estopped was immaterial. *Ib.*

8. An accommodation indorser, before maturity, of a negotiable promissory note, given to a mutual insurance company for premiums, who has been obliged to pay the amount thereof to a subsequent indorsee, may recover the amount so paid of the maker, on a count for money paid; or, *it seems*, as indorsee of the note; although when he indorsed the note, the insurance company, as he knew, had become indebted to the maker for the amount of a loss larger than the amount of the note. *Barker v. Parker*, 339.
 9. In an action by an indorsee against the maker of a negotiable promissory note, payable to an insurance company, and indorsed to the plaintiff before its maturity, claims against that company cannot be set off, although the indorsee knew that the note was given for premiums of insurance. *Barker v. Valentine*, 341.
- See EVIDENCE, 5, 15; FORGERY; JUDGMENT, 2; MUTUAL INSURANCE COMPANY, 3, 4; PAYMENT; PRINCIPAL AND AGENT; WITNESS, 1

RAILROAD.

1. A railroad corporation incorporated by law in this state is not exempted from liability for the loss of goods delivered to it to be carried over part of its road to the state line, by having previously leased that part of its road to a corporation established by law in an adjoining state, whose road connects with it at the state line. *Langley v. Boston & Maine Railroad*, 103.
2. A railroad corporation, empowered by law to mortgage their franchise and property, after making a mortgage of all their lands, franchise and privileges, and "all the locomotive engines, cars and other articles of personal property whatsoever, now owned or used by the corporation, or which they may hereafter own or use," authorized their directors to issue bonds to the amount of \$1,200,000 to pay debts contracted in building and furnishing their road, and to secure such bonds by "an additional or second mortgage of the road, franchise and property of every description, including cars and engines," subject to the first mortgage, and "as full and complete" as that. Pursuant to this authority, bonds were issued, and a second mortgage made of all the lands, franchise and privileges of the corporation, "and the property and premises whatsoever mentioned, specified, described or referred unto in the" first mortgage. *Held*, that the second mortgage, as against a subsequent attachment, conveyed engines and cars acquired by the corporation after the first and before the second mortgage. *Henshaw v. Bank of Bellows Falls*, 568.
3. The president of a railroad corporation, authorized by vote of the corporation to execute and deliver, and "to do and perform all other acts and things necessary to give validity and effect to" a mortgage of the road, franchise and property of the corporation to trustees for the benefit of bondholders, executed upon the eve of the failure of the corporation, a deed of surrender of the whole road and property to the trustees, who, upon the failure of the corporation, took possession of the road and property, and afterwards kept exclusive management and control thereof. *Held*, that the trustees thereby obtained and kept actual possession of the property, good as against subsequent attaching

creditors; although the laws of the State required not only delivery, but continuous and exclusive possession of the grantees, to perfect such a title; and although the trustees continued to employ in the management of the road the same persons who had been employed by the corporation; and although the mortgage provided that the trustees should permit the corporation to retain the exclusive use and possession of the property until some default in paying the principal or interest of the bonds, which had not yet occurred. *Ib.*

See EMBEZZLEMENT, 1, 2; EQUITY, 5.

RECEIVER OF STOLEN GOODS.

See EVIDENCE, 3.

REPLEVIN.

See MORTGAGE, 2.

REPRESENTATIVES.

See HOUSE OF REPRESENTATIVES.

RESERVATION.

See DEED, 4.

REVIEW.

1. Under Rev. Sts. c. 99, § 19, a review may be granted by the court of common pleas of a judgment of that court, affirming a judgment of a justice of the peace on the complaint of the defendant in review. *Anderson v. Brown*, 92.
2. On a writ of review of the court of common pleas, affirming, on complaint of the defendant in review, a judgment of a justice of the peace, from which an appeal had been taken by the plaintiff in review, but not entered, the case must be tried on its merits, as if an appeal had been duly entered. *Ib.*
3. In a writ of review of a judgment of the court of common pleas, an omission to allege that the judgment was rendered on complaint of the defendant in review in affirmance of a judgment of a justice of the peace is no variance. *Ib.*

SALE.

1. The Rev. Sts. c. 28, § 154, requiring lumber to be surveyed before sale, do not apply to a sale in another state of lumber in this commonwealth. *Hardy v. Potter*, 89.
2. Testimony of a purchaser of lumber that he bought and paid for it in another state, the lumber being then in the custody of an agent of the seller in this state, to whom the seller promised to write; that nothing more was to be done between the seller and himself in relation to the sale; and that he afterwards saw it here; is sufficient evidence of a delivery to be submitted to the jury. *Ib.*

See INSOLVENT DEBTORS, 6.

SCHOOL DISTRICT.

Any subdivision of one school district which has been altered within ten years is within the prohibition of *St.* 1849, c. 206, that "no town shall be districted anew for school purposes, so as to change the taxation of lands of proprietors into districts using different school-houses, oftener than once in ten years." *Gustin v. School District in Danvers*, 85.

SCHOOL-HOUSE.

1. A building committee of the selectmen of a town which had not been divided into territorial school districts selected a lot of land for a school-house, and, on the refusal of H., the owner, to sell it, applied to the selectmen to call a meeting of the town. At such a meeting, called "to see if the town will authorize the selectmen to select at their discretion a school-house lot," it was voted, "that the selectmen be and they are hereby authorized to select at their discretion a school-house lot and lay out the same, from the land of H. heretofore selected by the town." *Held*, that this was not a sufficient designation of land by the town to authorize the selectmen to select out of it a school-house lot, under *St.* 1848, c. 237. *Harris v. Inhabitants of Marblehead*, 40.
2. *It seems*, that a notice that the selectmen, in accordance with a vote of the town, will on a certain day lay out and assess damages for the taking of a lot of land, but not stating that it is for a school-house, is insufficient. *Ib.*
3. A town which, against the owner's will, illegally takes a lot of land for a school-house lot, and erects a school-house thereon, cannot be allowed anything for betterments, under the Rev. Sta. c. 101, §§ 19, 20. * *Ib.*

SCIRE FACIAS.

See EXECUTION; TRUSTEE PROCESS, 2, 3.

SEARCH WARRANT.

See SPIRITUOUS AND INTOXICATING LIQUORS, 5.

SEASHORE.

See FLATS.

SENTENCE.

See INDICTMENT, 4.

SERVICE OF WRIT.

1. *It seems*, that under the Rev. Sta. cc. 90, 92, no judgment can be rendered at the first term upon the default of a defendant who was out of the State at the time of the service of the summons, whether he has ever been an inhabitant of the State or not. *Thayer v. Tyler*, 164.
2. Under *St.* 1839, c. 158, judgment cannot be rendered against a foreign corporation, without such notice as is provided by the Rev. Sta. c. 92. *Ib.*
3. Service of process upon a foreign insurance company who have appointed an

attorney in this commonwealth to accept service of process against them, as required by *St.* 1851, c. 331, must be made upon him. *Id.*

See TRUSTEE PROCESS, 3.

SET-OFF.

See PARTNERSHIP, 3 ; PROMISSORY NOTE, 9.

SHIPS AND SHIPPING.

- 1 Under the U. S. St. of 1850, c. 27, requiring every mortgage or conveyance of any vessel or part of a vessel to "be recorded in the office of the collector of customs where such vessel is registered or enrolled," the record must be made in the district of the last registry and enrolment, though not the home port of the vessel; and a mortgage not so recorded conveys no title as against an attaching creditor of the mortgagor, although his attachment is not made until after the mortgagee has taken possession for breach of condition of his mortgage. *Potter v. Irish*, 416.
2. By a charter party of a vessel for a voyage from New York to Charleston, and thence to Liverpool, the master and partowner agreed to victual and man the vessel and keep her in good condition, and the charterer agreed to furnish her with a full cargo of cotton at Charleston and to pay a certain freight on delivery of the cotton in Liverpool; the vessel was to be consigned to the charterer's friends in Charleston, and to their agents in Liverpool, and what money the master might require for the ship's disbursements in Charleston was to be advanced to him, and paid by his bill of exchange on the freight. The vessel was laden at Charleston, and the master drew a bill accordingly on the said agents at Liverpool, and by letter requested them to accept the same and to insure the amount on account of the owners of the vessel. The vessel on her arrival at Liverpool was committed to said agents, and they paid the disbursements, delivered a portion of the cargo and collected part of the freight, and then became bankrupt. The master collected the rest of the freight himself, and paid the bill of exchange which he had drawn on them. *Held*, that drawing the bill on the consignees at Liverpool did not make them the master's agents to collect freight; that he had a lien on the freight for the charter money, and was entitled to retain from the amount collected by him the whole of the charter money, after deducting the ship's disbursements at Liverpool. *Welch v. McClintock*, 215.
3. Merchandise was shipped under an agreement between the shippers and the shipowner that it should be carried around Cape Horn or elsewhere for a market, and the net proceeds, deducting charges and master's commission on sales, invested in specie or bullion and shipped to the United States or Canton; if to Canton, to be invested in such goods as the shippers might direct, to be shipped to Boston, subject to a deduction of the usual charges, and on their arrival in Boston to be sold by auction, and, after deducting from the net proceeds the original cost and all charges except premiums of insurance and interest on the money, "the residue or profits to be equally divided between the shipper and

shipowner." The ship went around Cape Horn, and the master sold the cargo in Chili and Peru for specie, part of which was forcibly taken from him by the government of Chili, then at war with Spain; and, being unable for want of funds to proceed to China at once, traded along the coast, and afterwards went to Canton, invested the remaining proceeds of the outward cargo and other funds in a cargo for Peru, went to Peru, and there sold it for specie, part of which he remitted to Boston, where it was distributed among the shippers, and the residue with the brig were seized and appropriated by the Chilian government, who many years afterwards, under treaty with the United States, paid about two thirds of the cost of the original cargo, with interest from the time of seizure. *Held*, that the owner of the ship was not entitled to any portion of the money paid by Chili, although, including the interest, it exceeded the original cost of the goods; nor of the money sent home by the captain from Peru, without proof of the terms upon which the goods were shipped from Canton to Peru. *Cabot v. Amory*, 428.

See INSURANCE, 18; PARTNERSHIP, 3; TAX.

SLANDER.

A declaration in slander for charging the plaintiff with being "a whore and a common prostitute" is not supported by proof of other words amounting to a general charge of unchastity. *Doherty v. Brown*, 250.

SPECIFIC PERFORMANCE.

See EQUITY, 5.

SPIRITUOUS AND INTOXICATING LIQUORS.

1. Under the *St.* of 1852, c. 322, § 14, intoxicating liquors may be sold by any person, though not himself the importer, in the original unbroken packages in which they were imported, and in quantities not less than those prescribed by the laws of the United States. *Bradford v. Stevens*, 379.
2. Upon the trial of an indictment on *St.* 1855, c. 215, §§ 15, 17, for selling intoxicating liquors "without having any license, appointment or authority therefor," the Commonwealth need not prove that the defendant did not when that statute took effect own the liquors sold by him. *Commonwealth v. Murphy*, 1.
3. The fifteenth and seventeenth sections of the *St.* 1855, c. 215, are constitutional and valid. *Ib.*
4. One indicted on *St.* 1855, c. 215, § 17, for being a common seller of intoxicating liquors, cannot except to a refusal of the presiding judge to rule that, if that statute provides for a trial contrary to the course and usage of the common law, it is unconstitutional and no verdict should be found under it. *Commonwealth v. Rock*, 4.
5. An officer seizing, under a search warrant duly issued for intoxicating liquors,

Hquors not described in the warrant, is liable to an action by the owner thereof, notwithstanding *St.* 1855, c. 215, § 38. *Arthur v. Flanders*, 107.

See NUISANCE ; WITNESS, 5.

STATUTE.

See EQUITY, 4 ; LIMITATIONS, 2.

STATUTES CITED, EXPOUNDED, &c.

ENGLISH STATUTES.

22 & 23 Car. 2, c. 10, § 5.	Advancement,	106
2 & 3 W. 4, c. 71.	Easement,	379

STATUTES OF THE UNITED STATES.

1792, c. 39.	Registry of Vessels,	420, 421, 423
1793, c. 46.	" "	421
1803, c. 18.	" "	421
1850, c. 27.	Record of Conveyances of Vessels,	416

STATUTE OF VERMONT.

Compiled Statutes, c. 194, § 13.	Railroad Bonds,	569, 570
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STATUTES OF THE COMMONWEALTH.

1785, c. 12.	Foreign Will	163	1845, c. 163, § 8.	Essex Co.	56
1803, c. 111.	South Boston	527, 528	1846, c. 242.	Trust	27
1804, c. 120.	Forgery	481	1847, c. 231.	Trustees	27
1808, c. 65.	Manufacturing Corporation	605	1848, c. 237.	School-houses	40
1817, c. 87.	Equity	163	1849, c. 106.	School Districts	85
— c. 190, § 12.	Limitations	31	1850, c. 277.	Steam Boiler	280
1824, c. 16.	Sidewalks in Charlestown	294	1851, c. 186.	School-houses	42
1826, c. 13.	Mercantile Wharf	402	— c. 315.	Manufacturing Corporation	600
1834, c. 186.	Embezzlement	188	— c. 327.	Insolvent Corporations	243, 582
1836, c. 19.	Whittenton Mills	595	— c. 331.	Foreign Ins. Co.	164
1838, c. 99.	Railroad	104	1852, c. 144.	Light and Air	378
— c. 163, § 3.	Insolvent Debtors	604	— c. 195.	Manufacturing Corporation	597
— § 5.	" " 171,	247	— c. 247.	Steam Boiler	280
— § 7.	" " 333		— c. 294, § 1.	Limitations	280
— § 21.	" 254, 260, 263,	598	— c. 312, § 2.	Declaration	361
1839, c. 139, § 2.	Tax	99	— § 10.	Affidavit of Merits	374
— c. 158.	Foreign Corporation	164	— §§ 17, 21, 23.	De-murrer	331, 502, 503
840, c. 97.	Executor's Sale	31	— § 26.	Answer	215
1844, c. 178, § 5.	Insolvent Debtors	327			

1852, c. 322, § 14. Intoxicating Liquors	379	1855, c. 215, § 38 Intoxicating Liquors	107
1853, c. 149. School-houses	40	— c. 231. Lien on Ships	54
— c. 347. " "	40	— c. 264. Attachment	242
— c. 371. Equity	16	— c. 283. Limitations	208
1854, c. 454, § 8. Loan Fund Association	94	— c. 405. Nuisance 9, 464,	467
1855, c. 152. Jury	4	— c. 444. Poor Debtors	236
— c. 195. Equity	16	1856, c. 70. Venue	398
— c. 215, § 2. Intoxicating Liquors	381	— c. 284. Courts of Insolvency	57
— §§ 15, 17. " "	1, 4	1857, c. 141, § 10. Poor Debtor	491
		— §§ 21, 22. Bail	490
		— c. 267. Waiver of Jury	400

REVISED STATUTES.

c. 2, § 3. Corporation	598	c. 81, § 26. Judge's Report	241
c. 7, §§ 9, 13. Tax	99	— §§ 34, 35. Appeal	376
c. 23, §§ 24, 28, 30, 32. School-houses	43	c. 82, §§ 12-14. Exceptions	375, 376
c. 28, § 154. Lumber	89	c. 90, §§ 44-48. Absent Defendant	164-166
c. 35, § 2. Usury	39	— §§ 78, 79. Mortgage	37, 334
c. 37, § 18. Insurance Company	325	c. 92, § 3. Absent Defendant	164-168
— § 31. " "	299, 300	c. 99, § 19. Review	92
— §§ 34, 35. " "	327	c. 100, § 22. Amendment	288
c. 38, §§ 2, 9, 11, 19, 22. Manufacturing Corporation	595, 596, 600	c. 101, §§ 19, 20, 29, 32-34. Bet- terment	44
— §§ 25, 29, 31. " "	232, 596, 606	c. 103, § 25. Partition	15
c. 39, § 49. Treasurer	187	c. 109, § 41. Scire Facias	372
— § 58. Railroad	56	c. 111, §§ 4, 9, 18, 21. Habeas Corpus	242
c. 59, § 14. Deeds	69	c. 117, § 4. Lien	55
c. 60, §§ 27, 28. Easement	379	c. 126, § 29. Embezzlement	173, 187
c. 61, § 9. Advancement	105	c. 127, § 2. Forgery	477, 483
c. 62, §§ 17-20, 32. Foreign Will	163	— § 8. " "	472
c. 71, § 37. Executor's Sale	34	c. 133, § 11. Larceny	469
c. 73, § 21. Scire Facias	29	c. 137, § 11. Verdict	11
c. 74, § 4. Statute of Frauds	215	138, §§ 2, 3, 5, 6, 13. Costs	463
c. 76, § 7. Divorce	241		
c. 81, § 8. Equity	163, 532		

TAX.

Under the Rev. Sta. c. 7, § 13, and St. 1839, c. 139, § 2, ships belonging to a partnership and employed in its business are to be taxed to the partners jointly in the town where their business is carried on, and not separately at their places of residence. *Peabody v. County Commissioners*, 97.

See LANDLORD AND TENANT, 2 · SCHOOL DISTRICT.

TENANT IN COMMON.

See DEED, 8 ; EQUITY, 3.

TENDER.

1. A tender of the amount of a debt without costs is insufficient, after a writ has been sued out thereon, and sent to an officer for service, although not yet actually delivered to him. *Emerson v. White*, 351.
2. An owner of stereotype plates in the possession of a mechanic who refuses to give them up, except on payment of a bill due for printing, and also of a bill for repairs on the plates, which is not due, is not bound to tender payment of the bill already due, if he is ready to pay it on the delivery to him of the plates. *Stickney v. Allen*, 352.

TIME.

See INSURANCE, 5 ; POOR DEBTORS, 1.

TOWN.

See JUDGMENT, 3 ; SCHOOL HOUSE ; TRUST, 5.

TRESPASS.

See ACTION ; ESTOPPEL ; HUSBAND AND WIFE, 4 ; DAMAGES, 6.

TROVER.

See ACTION ; DAMAGES, 3-5.

TRUST.

1. L. and M. purchased real estate and had it conveyed to L., who furnished the purchase money ; and L. wrote to an attorney the following letter: "The agreement between M. and myself is simply this: We have purchased an estate" (describing it) "which has by mutual consent been conveyed to me, I having paid and secured the purchase money. Whatever disposition is made of the property, the profit and loss are to be divided between us, deducting interest. You will please make such papers as are necessary to carry this agreement into effect." L. afterwards, with M.'s assent, divided the estate into lots, and sold them, and died insolvent. *Held*, that the letter of L., having been acted on by the parties, was evidence of a trust or a partnership, and sufficient to satisfy the statute of frauds ; that the lots sold vested in the purchasers discharged of any trust ; but that any mortgages taken back by L. upon sales were part of the trust fund. *Montague v. Hayes*, 609.
2. Under a will which declares that all moneys paid as and for dividends on shares in any corporation held by trustees under the will "shall be deemed and taken to be income and be appropriated as income according to the provisions of my will, excepting such dividends as shall be made and declared expressly as dividends of capital," *cestuis que trust* for life are entitled to dividends on shares in a wharf corporation, of profits arising from purchasing

land, filling up flats, laying out streets, and erecting, leasing and selling warehouses, although in part consisting of proceeds from the sales of real estate of the corporation, if it does not appear that the capital or the value of the shares has been thereby diminished; and even, *it seems*, if it does so appear. *Balch v. Hallet*, 402.

8. The execution of a power, affected by a trust for the benefit of children and their issue, to which the consent of a majority of the children living at the time of executing it is made necessary by the will creating the power, is valid in equity without such consent, if the children are all dead at that time. *Leed v. Wakefield*, 514.
4. A testator, who left a wife, three sons and a daughter, devised the rents and profits of real estate to his wife during her life, and, in case she should die before all his children should be of age, directed his executor to take possession of the estate and, as long as any of the children should be under age, appropriate the income to their support, "and as soon as all my children shall have come of age (their mother being dead) my said executor shall proceed to sell and dispose of my said estates, consulting and advising however with my said children, and not selling unless the consent of a majority of my said children then living shall be obtained in writing to the said sale," and distribute the proceeds among the four children equally, giving the share of any child who should be dead to its lawful issue, or, if there should be no such issue, to the surviving children equally; and further, if the wife should not die till all the children should be of age, take possession of the estate and proceed to sell it "in the same way and under the same limitations, and distribute the proceeds thereof in the same manner as is above provided in the case of my wife's dying before all my children shall have come of age." All the children came of age and died in the wife's lifetime; all without issue, except one son, who left a child; the daughter conveyed her interest before her death; at the widow's death, the executor sold the real estate. *Held*, that the daughter's interest was either contingent, or, if vested, was divested by the execution of the power, and in either case her grantee had no interest in the proceeds of the sale. *Id.*
5. A testator devised his farm to the selectmen of a town "and their successors in office forever," in trust "yearly and every year to appropriate and pay all the rents, incomes and profits of the said farm for the support of a gospel minister or ministers in said town, of the Congregational denomination; the said selectmen to be always accountable to said town, and to render to said town annually, and as much oftener as said town may require, a true and faithful account of all their proceedings relative to said farm;" "subject however to these directions and restrictions:" that in case of strip or waste, or of misappropriating any part of the income, or of the selectmen's refusal or neglect to render an account to the town, then the two oldest persons in the nearest degree of kindred to the testator within the county might proceed to settle the matter by submission to arbitration, and, if the selectmen should neglect for six months to pay to said kindred any sum awarded, "the said two of my said kindred shall forthwith take possession of my said farm; and the said farm shall descend thenceforward to them, in equal shares, to have and to hold the

same to them and their heirs and assigns forever; and the term of said selectmen and of said town in said farm shall thenceforward and forever cease and expire." At the time of the execution of the will there was but one religious society in the town. *Held*, that this devise was not for the benefit of the Congregational minister or ministers in the town, but for the benefit of the inhabitants of the town in their parochial capacity, and, upon their subsequent legal organization as a separate corporation, in trust for the parish; that the selectmen took an estate in fee, and not a life estate upon condition; that the executory devise to the testator's next of kin was void as tending to create a perpetuity; that the legislature might provide by law for the election of new trustees by the parish; and that a sale by such trustees, under license granted by this court, pursuant to *St* 1846, c. 244, passed a good title as against all parties. *Wells v. Heath*, 17.

See EQUITY, 1, 2; PLEADING, 1; WILL.

TRUSTEE PROCESS.

1. An attachment by trustee process against a foreign corporation is defeated by a certificate of discharge of the trustee in insolvency. *Pingree v. Hudson River Ins. Co.* 170.
2. On *scire facias* against a trustee in foreign attachment, the defendant cannot avail himself for the first time of the objection that the money in his hands is due from him jointly with another person, upon whom no service was made, although he was named in the original writ; even if the money has since been attached by another person. *Hoyt v. Robinson*, 371.
3. A trustee in foreign attachment may object on *scire facias* that judgment was rendered in the original action at the first term against the principal defendant, who was not in the State at the time of service, without giving the further notice required by statute in such cases. *Thayer v. Tyler*, 164.

USURY.

See MORTGAGE, 4; WITNESS, 1.

VARIANCE.

See INDICTMENT, 2, 3; LANDLORD AND TENANT, 1; PARTNERSHIP, 2; REVIEW, 3; SLANDER.

VENUE.

See PLEADING, 3.

VERDICT.

Upon an indictment for a felonious assault by shooting with a pistol with intent to murder, the jury returned a verdict of "guilty of the assault and battery as charged, but without the felonious intent." *Held*, that this verdict might be amended by the court during the same sitting by striking out the words "and battery;" and, thus amended, was sufficient. *Commonwealth v. Lang*, 11.

WATERCOURSE.

See EASEMENT.

WAY

1. A grant of "liberty to pass and repass over my land where it is necessary, confers a right of way to and from those lands only which the grantee owns at the date of the deed; and the burden of proof is on him and those claiming under him, if sued as trespassers, to show what those lands were. *Smith v. Porter*, 66.
2. The owner of a right of way over a passage way may, for the purpose of keeping the way fit for use, disturb the soil and pave or repair it, making no material change in its condition, nor interfering with the estates of others in the way. *Brown v. Stone*, 61.

See DRED, 2; EVIDENCE, 19-21; JUDGMENT, 3; LANDLORD AND TENANT, 2.

WILL.

A testator devised real estate to his grandson in fee; and by a codicil directed the estate to be held by trustees "in trust to pay over to him quarterly the net income of said estate, so long as he shall remain unmarried; and, in the event of his marriage or his dying unmarried, to convey the estate to his heirs." Held, that the restraint upon marriage was against the policy of the law, and the gift over was void. *Otis v. Prince*, 581.

See EQUITY, 1; TRUST, 2-5.

WITNESS.

1. In an action against the maker of an accommodation note, the party for whose accommodation it was made is a competent witness to prove that he negotiated it for a usurious consideration, in another state, whose laws render usurious contracts void, to a party from whom the plaintiff took it after maturity. *Newell v. Holton*, 349.
2. The testimony of a witness who declares himself unable to answer questions put to him on cross-examination, on the ground that his memory at times fails him in consequence of mental injury resulting from a sunstroke, and such is his present condition, is not to be stricken out by the presiding judge, but may be submitted to the jury. *Levis v. Eagle Ins. Co.* 508.
3. An accomplice, who has testified to facts criminating the prisoner and himself, cannot afterwards decline to answer a question upon the ground that it will criminate himself. But if, after so declining, he offers to submit himself to the examination, a party who refuses the offer has no ground of exception. *Commonwealth v. Price*, 472.
4. It is no ground of exception that a party was allowed to ask a counsellor at law, on cross-examination, whether he had not filed interrogatories to him in behalf of the other party, and obtained a continuance of the action at the last term, and refused a continuance at this term, because the parties them-

selves would be made competent witnesses by statute before the next term. *Winship v. Neale*, 382.

5. Upon the trial of an indictment for unlawful sales of intoxicating liquors, two witnesses testified that they drank such liquors together at the defendant's shop and other places; one of them testified that his object was to inform against the sellers; but both testified that the other did not know of this object, and he testified that his only object was to gratify his appetite. He was asked on cross-examination whether on leaving one of these places the other witness did not whistle for him, and answered in the negative. *Held*, that this answer was immaterial, and could not be contradicted. *Commonwealth v. Farrar*, 6.
6. A witness, who has been impeached by evidence that he previously testified differently, cannot be corroborated by evidence that he had made still earlier statements, not under oath nor in the prisoner's presence, in accordance with his present testimony. *Commonwealth v. Jenkins*, 485.

WRIT.

A writ sued out by an assignee of the estate of an insolvent debtor need not aver that he is such under the insolvent laws of the Commonwealth. *Brigham v. Coburn*, 329.

See REVIEW, 3; SERVICE OF WRIT; TENDER, 1.

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